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ABSTRACT

Based on Commission public hearings held in 1977 through 1979 and on research conducted since 1977, this report examines state, federal, and tribal governments' role in major conflicts concerning fishing rights, reservation criminal law enforcement, and Eastern Indian land claims existing between Indian tribes and non-Indians. Chapter 1 discusses the public awareness of Indians and Indian issues during the late 1970s. Chapter 2 traces the major events in Federal-Indian relations from the precolonial period to the present, briefly summarizes the major concepts of Federal Indian law, describes the historical developments of the concept of Indian rights, and discusses the relations between tribal governments and state, local, and federal governments. In the next chapters, detailed case studies (i.e., Passamaquoddy Tribe v. Morton, Oneida v. County of Oneida, the Mashpee Jury Trial, claims by the Cayuga Indian Nation, St. Regis Mohawk Indians, and Catawba Tribe) trace the historical origins of the conflicts, focusing on the governments' role, particularly the federal government, throughout the crises. Generally, the report concludes that the present system for protecting Indian rights has significant limitations, that coherent mechanisms for determining and implementing Indian policy are lacking, and that conflicts over Indian rights exacerbate preexisting problems Indians face concerning denials of equal protection of the laws. (NQA)

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INDIAN TRIBES

A Continuing Quest for Survival

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U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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Letter of Transmittal

June 1981

THE PRESIDENT
THE PRESIDENT OF THE SENATE
THE SPEAKER OF THE HOUSE OF REPRESENTATIVES

Sirs:

The United States Commission on Civil Rights transmits this report to you pursuant to Public Law 85–315, as amended.

Indian Tribes: A Continuing Quest for Survival is based on a series of Commission public hearings held in Washington State, South Dakota, and Washington, D.C, 1977 through 1979, as well as research conducted during and since this period. The Commission also held hearings in Arizona and New Mexico in 1972 and on the Navajo Reservation in 1973. The report examines the role of State, tribal, and Federal governments in some of the major conflicts—fishing rights, reservation criminal law enforcement, and eastern Indian land claims—that exist between Indian tribes and non-Indians. These conflicts and the manner in which they are resolved have profound implications for the civil rights status of American Indians.

In all the crisis or conflict situations explored, the role of the Federal Government has been crucial. Throughout the sometimes long term development of these complex situations, critical actions were occasionally taken without any government recognition of their significance. Inaction and missed opportunities characterize the seeming inability of the United States to implement effectively the promises and commitments it has historically made to the tribes.

Generally, the report concludes that the present system for protecting Indian rights has significant limitations, that coherent mechanisms for determining and implementing Indian policy are lacking, and that conflicts over Indian rights exacerbate preexisting problems Indians face concerning denials of equal protection of the laws.

Some of the problems discussed in the report will require legislative remedies, and others may be solved more readily by administrative action. It is our hope that this report will serve as a basis to remove impediments and to create mechanisms that will aid the first Americans in their continuing quest for cultural and political survival in our diverse society.

Respectfully,

Arthur S. Flemming, *Chairman*
Mary F. Berry, *Vice Chairman*
Stephen Horn
Blandina Cardenas Ramirez
Jill S. Ruckelshaus
Murray Saltzman

Louis Nuñez, *Staff Director*

Preface

During the decade of the 1950s, the Federal Government began one of the major, abrupt swings in direction that has characterized its Indian policy. The development of the policy of termination, designed to remove the Federal Government from its protectorate role in Indian affairs, closely followed a 20-year period of sustained Federal efforts to stop the erosion of tribal powers and land bases. Felix Cohen, Associate Solicitor of Indian Affairs in the Department of the Interior during the tenure of Franklin D. Roosevelt and the leading scholar of Indian law of this century, vigorously opposed the developments of the 1950s. Cohen, in an article written shortly before his death, searched for an analogy that would bring home to all Americans the importance of the Government's keeping its promises to Indians, whose role in America he compared to that of Jews in 20th century Germany:

> Like the miner's canary, the Indian marks the shift from fresh air to poison air in our political atmosphere. . .our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith.[1]

Cohen and others failed in their efforts to halt the onslaught of terminationist policies, and Indian tribes paid a heavy price. More than a hundred tribes were legally terminated, land and assets were lost, thousands of Indians were relocated by Federal programs to the culture shock of urban slums, States were given a broader role on many surviving reservations (a development that would exacerbate jurisdictional conflicts for years to come), and tribal governments were generally weakened. This was a period in American history when civil liberties generally were under substantial attack.

In late 1977, the U.S. Commission on Civil Rights began a study of the civil rights implications of several highly charged conflicts involving Indian rights and the interests of non-Indians. This study was prompted by complaints received by the Commission and by requests for an investigation from Indian groups, State Advisory Committees, and regional offices, and based in part on the Commission's early hearings in New Mexico and Arizona. During the Commission's hearing in Washington State in 1978 concerning the fishing rights controversy, the testimony of several high Federal officials prompted Commissioner Frankie M. Freeman to comment:

> a problem that troubles me. . .is the perception. . .that one can negotiate away basic. . .treaty rights. . . .If rights will not be respected and laws will

[1] Felix S. Cohen, "The Erosion of Indian Rights, 1950–1953, A Case Study in Bureaucracy," *Yale Law Journal*, vol. 62 (1953), p. 390.

not be obeyed by the Federal and State governments we are establishing a dangerous precedent.[2]

Twenty-five years and several shifts in Federal policy separate the Cohen and Freeman statements. The point is the same, however—if this society through its government does not live up to its promises and commitments to Indian people, then no rights are secure. A society is not judged by how well it treats its rich or politically powerful members but by how well it treats its less powerful groups. Indians are perhaps the least powerful group in American society. Since they are so few in number, there is no way they can be a political force. They will not determine national elections or even most State or local elections by their numbers.

Although Indians possess substantial resource wealth—coal, gas, uranium, water—this potential wealth has not been translated into permanent economic or political power. In fact, wealth or the potential for wealth has often made Indians the victims of more powerful interests greedy for the assets under Indian control. Without wealth or political power, Indian tribes have had to rely upon the constitutional-legal system and the moral conscience of society for their survival.

Tribal survival was an issue at the time the United States was established, and it has continued to be an issue throughout our history. A key factor in this issue is the status of Indian people as governmental entities, as tribes with land bases and power over those land bases. This factor distinguishes them from any other group in American society. "Indian people relate to the Federal Government as nations and tribes and citizens of nations and tribes, and on that basis first and in other ways only incidentally."[3]

Their relationship with the Federal Government is in fact crucial to the whole fabric of Indian affairs. From the beginning of the Federal relationship, the tribes have been treated as nation-states. Our legal system, in interpreting international law, so recognized the tribes. Two other extremely important concepts have been grafted onto the legal status of tribes in the American political system. One is the trust relationship in which the tribes are viewed as political entities dependent on the stronger United States for support and protection.

The other major concept is the important and controversial "plenary powers" doctrine, which literally means that the Congress of the United States is vested with extraordinary powers with respect to Indian tribes. It can, without regard to most constitutional safeguards, do whatever it wants in Indian affairs. Since no

[2] *Hearing Before the U.S. Commission on Civil Rights, Seattle, Washington,* Aug. 25, 1978, vol. III, p. 40.

[3] U.S., Department of the Interior, Bureau of Indian Affair, *Report on the Implementation of the Helsinki Final Act as Applied to Native Americans* (1979), p. i.

international forum or court has yet been able to enforce treaties or hold the United States accountable for the violation of any of its pledges to Indians, and since the United States court system will only review congressional action to a limited extent, it ultimately remains a moral issue—to what extent does the United States live up to its obligations?

The relationship of the Federal Government to Indian tribes, therefore, has been and continues to be a crucial and complex one. Indians are a race separate and apart from other Americans. This fact permeates past and current relations and is woven through the entire fabric of Federal Indian policy. The dominant society has generally characterized Indians with stylized romanticism or blatant stereotypes, and different and separate all too often have translated as "inferior" and "unequal."

Notions of racial superiority or inferiority would play no role if the trust were purely a political relationship, in the international law sense of the weaker nation to the stronger nation, or if it were a contractual relationship, providing that in return for Indian land the United States would protect and promote tribal interests. The trust concept as it evolved, however, has all too often portrayed Indians as minor or incompetent children who were not to be allowed a determinative voice in their own lives.

Another factor prevalent throughout the history of United States and Indian relations has been economic greed. Indians have possessed land and other resources that non-Indians have wanted. Non-Indians usually have prevailed. Often racism, expressed as white cultural superiority (whites would use the resource more appropriately), has been the justification for taking Indian land.

In the last three decades, the Nation has focused increased attention on addressing the civil rights problems of its different minority groups. Various studies of the Federal Government document that Indians have faced and continue to face pervasive discrimination in voting rights, educational opportunities, the administration of justice, the provision of social services—in short, the whole spectrum of civil rights problems. There is, however, some ambivalence among Indians about pursuing their civil rights, because they fear that in the process their separate tribal rights will be sacrificed.

This report of the United States Commission on Civil Rights explores situations during the last decade that have exacerbated existing civil rights problems for Indians. These "conflict" settings have not occurred in a vacuum. The first chapter, "The Apparent Backlash," traces developments of the seventies in which congressional and judicial victories achieved by the tribes appeared to be eclipsed

by the reaction of non-Indians against Indians and their interests.

Chapter two, "Context For Evaluation," is divided into four sections: historical overview, concepts in Federal Indian law, traditional civil rights problems, and State-tribal government relations. The historical overview traces the major events in Federal-Indian relations and provides a brief description of their significance. The legal section is a compendium of the major concepts and premises of Federal Indian law. The civil rights section describes how conflicts between tribal interests and non-Indian interests have produced a significant number of allegations of racial discrimination against Indians. This chapter ends with a consideration of the relations between tribal governments and State and local governments. In a very real sense, these entities have been classic adversaries. Much of this relationship is institutional and perhaps will always be present to some extent.

Chapters 3, 4, and 5 contain detailed case studies of the most publicized and controversial conflicts to occur in the seventies. The case studies concern fishing rights, eastern land claims, and law enforcement. None of these conflicts have been fully resolved, and it is most likely that all will continue in perhaps more muted versions for some time to come. The case studies trace the historical origins of the conflicts and focus on the role played by the various governments, particularly the Federal Government, throughout different stages of the crises. Chapter 6 summarizes the report and contains the Commission's findings and recommendations.

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Chapter 1

The Apparent Backlash

During the second half of the seventies, a backlash arose against Indians and Indian interests. Anti-Indian editorials and articles appeared in both the local and the national media.[1] Non-Indians, and even a few Indians as well, living on or near Indian reservations organized to oppose tribal interests. These local groups eventually coalesced into a national organization, the Interstate Congress for Equal Rights and Responsibilities, a group whose existence and viewpoints received substantial attention.

Senator Mark Hatfield (R–Ore.), during Senate hearings in 1977, said, "We have found a very significant backlash that by any other name comes out as racism in all its ugly manifestations."[2] Local and national legislators introduced bills that would, if passed, have been extremely detrimental to Indians. These included the abrogation of treaties between the United States and the various Indian tribes, the removal of tribal jurisdictional powers, the overturning of favorable judicial determinations of Indian rights, the restriction of Indian rights to water and other natural resources, and the elimination of the several eastern Indian land claims. The executive branch of the national government, after a decade of highly visible activity in Indian affairs, appeared ominously silent. Even the Federal judiciary, viewed as the most consistent ally of Indian rights and interests since the days of Chief Justice John Marshall, began to be perceived as showing signs of a reaction or backlash against Indians' interests.

Many reasons have been given to explain and to justify the backlash. One explanation argues that, although there is a significant reservoir of sympathy for their situation, excessive political and material demands by Indians have soured the basically favorable disposition of the American people. From this viewpoint, it is said that the backlash is not racial or even political but is, rather, opposition to the excesses of the activists. An "equal rights" theory is often advanced to argue that Indian political power and control over Indian destiny is antithetical to the American system of equality and that Indian interests must give way to those of the larger society.

Many individuals in the Indian world have placed a different construction on the backlash. They argue that the non-Indian interests, both governmental and private, that have been unfairly profiting at Indian expense have found their individual advantages disrupted by Indian legal and political victories and have organized to recapture their preferential position. In this view, the backlash is identified as a vocal minority of vested interests.

A major difficulty in evaluating what has appeared to be a backlash against Indians is that most Americans do not have any frame of reference for distinguishing normality from change. Mel Tonasket, of the Confederated Tribes of the Colville Reservation in Washington, has stated:

> I think a lot of the backlash coming from the common citizens is mainly out of ignorance, because of the lack of educational systems to teach anything about Indians, about trea-

[1] See, e.g., W.R. Hearst, Jr., "Goodies for Minorities," *Hearst Newspapers*, 1976; Kevin Phillips, "Too Obsessed With Minorities," *The Boston Herald*, Dec. 8, 1976.

[2] *Mashpee Lands: Hearing Before the Senate Select Committee on Indian Affairs on S.J., Res. 86*, 95th Cong. 1st sess. 38 (1977).

> ties. . . .When the population really doesn't know what the rights are and what the laws say, they have to make judgment decisions based on what the media puts out to them or what a politician [says].[3]

Public Awareness of Indians and Indian Issues

Chairman Arthur Flemming of the U.S. Commission on Civil Rights observed after listening to several days of testimony on Indian issues from a range of citizens in Washington State:

> it is clear to me, from the testimony we've listened to, that there are a great many adults who do not have any understanding of the treaties, of tribal government, and the implications of it, and so on, and they are reacting from a position of no knowledge.[4]

The absence of fundamental information and understanding about Indians in the public schools can be similarly illustrated by the curricula in law schools. Law is probably the single most important subject in contemporary Indian affairs. Practically every interaction in Indian affairs, and certainly every controversial issue, must be dealt with in the context of a unique body of laws and concepts known as Federal Indian law. An entire volume of the United States Code is devoted to Indian law.[5] Several of the initial acts of the first Congress in 1789 were laws pertaining to Indians.[6] Numerous U.S. Supreme Court decisions, lower Federal court decisions, and State court decisions exist that have direct application to the daily lives of Indian people. In fact, for their numbers in the population Indians are the most regulated, litigated, and legislated group in the United States. Yet until the past decade, any treatment of Indian law in law schools was the rare exception.

While improvement exists today, the teaching of Indian law is still relatively rare. One Indian leader made reference to the irony of sending Indian students to become lawyers so they could return home and serve their tribes, only to find that the returning lawyers had learned no Indian law because none was taught.[7] Most other education, whether directly relevant to daily Indian life or not, has evidenced the same problem.

The congressionally chartered American Indian Policy Review Commission has said:

> One of the greatest obstacles faced by the Indian today in his drive for self-determination and a place in this Nation is the American public's ignorance of the historical relationship of the United States with Indian tribes and the lack of general awareness of the status of the American Indian in our society today.[8]

Where information concerning American Indians is available in textbooks and curriculum, it tends to be historical. Indians are generally portrayed as ancillary to the progress of Western Europeans on the North American Continent. Information about Eastern Indians often relates to colonial times in general and to Thanksgiving in particular. Plains and Western Indians are usually portrayed in the context of Indian wars as the "settlers" moved westward.

These problems of perspective are not easily solved. In Washington State and in other parts of the country, tribes have made a concerted effort to influence the curriculum of the school systems that educate their children. While the lack of information and erroneous information reinforce the biases and preconceptions of non-Indians, many Indian parents believe that this flawed process has substantial negative effect on Indian students.[9] Joan La France, an expert in this field of Indian curriculum development, has said, "[W]e are treated as a people of the past. . . .There is a gross lack of information about us being a contemporary people, a people who still live in this country."[10]

Coupled with the general unavailability of data, particularly contemporary data, concerning American Indians is the persistence of stereotypes in the information provided by the educational systems.

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[3] Mel Tonasket, chairman, Colville Confederated Tribes Business Council, testimony, *Hearing Before the United States Commission on Civil Rights, Seattle, Washington*, Oct. 19–20, 1977, vol. I, pp. 38–39 (hereafter cited as *Seattle Hearing*).

[4] Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, statement, *Seattle Hearing*, vol. I, p. 232.

[5] Title 25 of the United States Code.

[6] Four of the first 13 statutes enacted by Congress concerned Indian affairs: Act of Aug. 7, 1789, 1 Stat. 49 (establishing the Department of War with responsibility, *inter alia*, for Indian affairs); Act of Aug. 7, 1789, 1 Stat. 50 (the Northwest Ordinance); Act of Aug. 20, 1789, 1 Stat. 54 (appropriations to support treaty negotiations); and Act of Sept. 11, 1789, 1 Stat. 67 (establishing salary for superintendent of Indian affairs in the northern district).

[7] Tonasket Testimony, *Seattle Hearing*, vol. I, p. 38.

[8] U.S., Congress, American Indian Policy Review Commission, *Final Report Submitted to Congress*, vol. I, 1977, p. 3 (hereafter cited as *Final Report*).

[9] Ramona Bennett, chairwoman, Puyallup Tribe, testimony, *Seattle Hearing*, vol. I, pp. 161–65.

[10] Joan La France, director, Curriculum Development Department, United Indians of All Tribes Foundation, testimony, *Seattle Hearing*, vol. I, pp. 216–17.

From the earliest days of the republic, two stereotypes have vied for prominence: the warlike savage and the childlike creature of nature (Rousseau's "Noble Savage"). Both are racist in approach and both reflect the cultural elitism that has permeated American Indian policy from the earliest days.[11] In a survey in Washington State schools concerning images of Indians, non-Indian children responded that "they (Indians) were things to be afraid of or frightened of or else novelties."[12]

The mass media play a significant role in the continuation and reinforcement of these stereotypes and myths. The Commission has on several occasions noted the role of television and radio in programming and in news with respect to stereotypes.[13] Veteran newspaper reporter Richard La Course, a Yakima Indian and former director of the American Indian Press Association, commented on the problem of Indians and the media:

> I think it originates in school systems. There is what amounts to a cultural filter which makes this individual TV reporter, that individual writer, perhaps a news director of a radio show incapable of actually perceiving what this day means. . . what its inferences are, what issues need to be investigated. . . .I think all of us have these cultural filters.[14]

Resurgence of Indian Activism

Although Indian activism has been viewed as a new occurrence, the perception is not accurate. In fact, there have been frequent eras of activism. This activism has taken many forms, but it is chiefly characterized by efforts to enhance tribalism and traditional Indian values with subsequently a negative reaction from the dominant society.

For example, at the turn of the 20th century, the Five Civilized Tribes,[15] who were removed in the 1830s from the eastern United States to the Oklahoma Territory, through activist tribal government had developed significant governmental, education, and economic systems in Oklahoma. But in the early 1900s, Congress stripped away most of the tribes' governmental powers.[16]

The latter part of the 19th century saw the revival of the Ghost Dance religion among the plains tribes. This event apparently was so terrifying to military authorities that the massacre of some 200 Sioux at Wounded Knee was a direct consequence.[17]

The activism of the 1930s, which in large part revolved around policies of the Roosevelt administration, primarily the Indian Reorganization Act of 1934,[18] was followed in the late 1940s and the 1950s by the termination era.[19] The Federal Government completely reversed its earlier course. Instead of continuing a policy of fostering tribal government and consolidating tribal land bases, it now embarked upon a policy of ending the Federal Indian trust relationship; transfering Federal responsibility and jurisdiction to the States with respect to Indian affairs; taking Indian assets from protected status and, in effect, placing them in the marketplace; and relocating vast numbers of Indians from reservation areas to urban areas.[20] Much of the Indian activity in this period was a response to these Federal policies. It was a period in which non-Indians could well have viewed Indian affairs as a dormant issue.

In the 1960s, a multiplicity of events coalesced to create a new era of Indian activism. Indian historian D'Arcy McNichols has attributed major significance to the development of Indian programs by the Office of Economic Opportunity during the Johnson administration: "The outstanding innovation of the period was the establishment of Indian Community Action Programs (ICAP), which brought reservation communities technical services and financial assistance."[21]

The effect of OEO programs was complex. They not only loosened the administrative grip of the Department of the Interior's Bureau of Indian Affairs by providing the tribes with other resources, but OEO could and did contract with tribes and tribal organizations to be providers of direct services. The initial effect of this contracting effort was in the area of Indian education, notably the demonstration project at the Rough Rock School on the Navajo Reservation.[22] The practice of tribes and tribal organizations replacing the Bureau of Indian

[11] See chapter 2, "Traditional Civil Rights."
[12] La France Testimony, *Seattle Hearing*, vol. I, p. 218.
[13] See, e.g., U.S. Commission on Civil Rights, *Window Dressing on the Set* (1978).
[14] Richard La Course, testimony, *Seattle Hearing*, vol. I, p. 222.
[15] The Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles are universally referred to as the Five Civilized Tribes.
[16] Felix Cohen, *Handbook of Federal Indian Law* (Albuquerque: University of New Mexico Press, 1948), pp. 425–55.
[17] Dee Brown, *Bury My Heart at Wounded Knee* (New York: Holt, Reinhart and Winston, 1970), pp. 432–48.
[18] Pub. L. No. 73–383, 48 Stat. 984.
[19] See chapter 2, "Historical Perspective."
[20] *Final Report*, pp. 150–53.
[21] *Ibid.*, pp. 70–72.
[22] U.S., Commission on Civil Rights, *The Navajo Nation: An American Colony* (1975), pp. 70–72.

Affairs as service providers eventually spread into all areas of tribal government operations. A decade later it would be codified as national Indian policy by both the executive and legislative branches.[23] Other events and influences occurred before the Federal codification, and these gave credence to a perception that a new era in Indian affairs was in the making.

Partially as an outgrowth of the disastrous Federal policies of the fifties—particularly relocation—many urban ghettos became the homes for thousands of American Indians.[24] These ghettos were and are places where Indians faced, among other problems, massive unemployment and underemployment,[25] social service systems that would not or could not respond to their needs,[26] and sustained assaults on Indian cultural and family ties.[27] These ghettos were also the breeding grounds for activism. Indian clubs and centers were established and expanded to address the problems faced by the relocated Indians. One significant development was the creation of the American Indian Movement (AIM) out of the Minneapolis Indian Center; it was, in effect, an urban Indian movement that would return to the reservation. Other national Indian organizations were also formed around this time, including the Survival of the American Indian Association and the National Indian Youth Council. These and other activist groups, whose tactics echoed those of the activists of the civil rights movement, gained widespread attention and publicity.

One of the earliest sparks of activism was the occupation of Alcatraz Island in San Francisco Bay. Other widely publicized events occurred in the same period and included: the Trail of Broken Treaties, a 1972 cross-country caravan to present grievances and demand action of the American government and people; the 1972 takeover and occupation of the Bureau of Indian Affairs headquarters building in Washington, D.C.; the 1973 occupation and siege of Wounded Knee in South Dakota (site of the infamous massacre by the United States cavalry a century earlier); the fish-ins and fishing camps along the Puyallup and Nisqually Rivers in Washington State to vindicate "treaty rights"; and the 1978 "Longest Walk" caravan, again to petition the United States to live up to its treaty obligations. These events were vocal, dramatic, and extensively covered by the media. They presented to the American public the issues and concerns of many American Indians, but at the same time presented an image of American Indians as aggressive and, at times, hostile and violent.

A wide range of professional support organizations were also developed during this period, and they would begin to address the disequilibrium between Indian interests and non-Indian interests in terms of technical resources and expertise. This development included the reorientation and expansion of preexisting entities such as the National Congress of American Indians (NCAI) and the creation of completely new groups such as the Council of Energy Resources Tribes (CERT), the American Indian Lawyers Training Program (AILTP), the Institute for the Development of Indian Law, the Native American Rights Fund (NARF), the Coalition of Indian Controlled School Boards, and American Indian Opportunity (AIO).[28] During this period other events occurred in the Indian world that would have profound implications but were generally less spectacular and hence less newsworthy. These included a dramatic increase in college and graduate work by Indian students, an increase that would produce several hundred Indian lawyers by the 1970s.

Of particular importance in these developments was the fairly widescale provision of lawyers to represent the range of Indian issues. Attorneys, whether members of the private bar paid for by tribal funds or public interest lawyers supported by the legal services of OEO or by foundations, were in this period frequently and aggressively representing their tribal and individual Indian clients. The results were dramatic. From the late 1950s through the middle part of the 1970s, albeit with specific and important exceptions, it appeared that Indians and their advocates had won the important legal battles. Although it is the rare court decision that attracts substantial press coverage, these cases, particularly in reservation areas, were major news events and

[23] *See*, e.g, President Nixon's July 8, 1970, Message to Congress, Recommendations for Indian Policy, H. Doc. No. 91-363, 91st Cong., 2d sess. (1970), and Indian Self-Determination and Education Assistance Act, codified at 25 U.S.C. §§450–950n, 455–458e (1976).

[24] U.S., Congress, American Indian Policy Review Commission, Task Force Eight, *Report on Urban and Rural Non-Reservation Indians* (1976), pp. 23–43.

[25] *Ibid.*, pp. 57–80.

[26] Faye La Pointe, representative, Tacoma Indian Center, testimony, *Seattle Hearing*, vol. I, pp. 138–39.

[27] U.S., Congress, American Indian Policy Review Commission, Task Force Four, *Report on Federal, State and Tribal Jurisdictions* (1976), pp. 78–87, 177–242.

[28] See, eARTH, *American Indian Reference Book* (Portage, Mich: eARTH, 1976), pp. 123–33, for a listing of Indian organizations.

their implications were speculated about with regularity in both the print and electronic media.

A sampling of these cases provides an indication of their importance to tribes and their non-Indian neighbors. One of the first significant cases in this 20-year period was *Williams v. Lee* [29] in which the Supreme Court of the United States held that a non-Indian doing business on an Indian reservation, absent a congressional statute authorizing otherwise, had to use tribal and not State courts to litigate a debt owed by Indians arising from a transaction on the reservation. The court relied on the early 19th century decisions of Chief Justice John Marshall and acknowledged tribal sovereignty as a concept that still had some vitality.[30] In *Menominee v. United States,* [31] the court held that certain treaty rights, specifically the right to hunt and fish, had survived Congress' termination of the Menominee Tribe. This decision gave credence to the vitality of treaty rights and strengthened the hopes of many in the Indian world that other treaty rights could be vindicated.

In *McClanahan v. Arizona Tax Commission,* [32] the Supreme Court struck down an Arizona State tax on income earned by Indians on reservation. Taxation would become a frequent arena of dispute between the States and local governments and Indians. States, pressed for funding sources, aggressively sought to tap Indian assets on reservations that under Federal law were to be protected from State incursions. The State of Montana was particularly aggressive in this arena, frequently asserting that tribes were not governmental entities but rather something akin to property owners associations. This argument was rejected by the Supreme Court in *United States v. Mazurie,* [33] which clearly recognized the governmental status of tribes.

Although the governmental status of tribes was clear in the courts, the exact perimeters of that status were not, and they would be frequently litigated on an issue-by-issue, tribe-by-tribe basis. Different tribes have different treaties with the U.S. Government. Congress has treated tribes individually for some purposes and similarly for other purposes and has treated States and tribes within those States differently from each other. Therefore, a decision in one situation concerning a particular tribe would not necessarily be applicable to another situation or to different tribes.

The issue of tribal powers over non-Indians, particularly in the area of criminal law, has been one of the most controversial and emotional issues of the last decade.[34] The initial decisions in a case arising on the Port Madison Reservation in Washington State created a furor. A Federal district court in *Oliphant v. Schlie* [35] held that the arrest by tribal police of a non-Indian who had assaulted a tribal officer during a tribal ceremony on the reservation was sustainable, based on inherent tribal jurisdictional powers that had not been lost.

The uniqueness of the Federal-Indian relationship and the special status of Indians vis-a-vis other Americans of any race, color, or national origin has been a frequent topic in the literature that developed during this period. In 1974 the Supreme Court directly faced a popularly held view that the special status of Indians denied the equal protection rights of other Americans.[36] The case, *Morton v. Mancari,*[37] involved a challenge by non-Indian employees of the Bureau of Indian Affairs to an Indian preference policy. The challenge asserted that such a preference was unconstitutional racial discrimination violating the equal protection clause of the 14th amendment and the due process clause of the 5th amendment. Not so, said the Supreme Court. Treating Indians differently from other classes of citizens is permissible when that treatment is tied to the unique trust relationship and obligations of the Federal Government to Indian tribes.

Another area of substantial court activity has involved the conflict between State wildlife interests and the treaty-protected hunting and fishing rights of the tribes. Perhaps no single decision of the Federal judiciary has been more associated with tribal activism and the apparent "backlash" than the decision of Federal District Court Judge George Boldt in *United States v. Washington,* [38] which became popularly known by the judge's name—the Boldt decision. This case recognized the treaty right of several Washington State tribes to one-half of the salmon harvest, the right to catch it, and the right as

[29] 358 U.S. 217, 223 (1959).
[30] See chapter 2, "Legal Concepts of Federal Indian Law."
[31] 391 U.S. 404, 412–413 (1968); see also Kimbal v. Callahan, 493 F.2d 564 (9th Cir. 1974), *cert. denied,* 419 U.S. 1019 (1974).
[32] 411 U.S. 164 (1973).
[33] 419 U.S. 544 (1975).
[34] See chapter 5.
[35] No. 511-73C2 (W.D. Wash. 1974), *aff'd,* 544 F.2d 1007 (9th Cir. 1975), *rev'd sub nom.,* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[36] See chapter 2, "Legal Concepts of Federal Indian Law," and "Traditional Civil Rights Problems."
[37] 417 U.S. 535 (1974).
[38] 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd,* 5.. F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976).

governments to be involved in the regulation of the resource.[39]

Within the array of controversial cases that are perceived as pro-Indian, the one with the most substantial ramifications in the eastern part of the United States appears to be *Joint Tribal Council of Passamaquoddy and Penobscot v. Morton,* [40] which set the stage for the Eastern Indian land claims. Although it is not a decision on the merits of the land claim, the Court made clear that the United States had an obligation to the tribes making the claims and that the claims themselves could not be dismissed summarily or treated as frivolous, as was the initial disposition of some State and Federal officials.[41]

Significant developments were also occurring in the other branches of the Federal Government. At the executive level, a dramatic shift in policy was announced by President Lyndon Johnson in 1968: "We must affirm the right of the First Americans to remain Indians while exercising their rights as Americans. We must affirm their rights to freedom of choice and self-determination."[42]

"Self-determination" was destined to become the catch phrase to describe this era of Federal Indian policy, which had its beginnings in the latter part of the 1960s. In 1970 President Richard Nixon gave impetus to the policy of self-determination in a special message to Congress on Indian affairs.[43] He specifically repudiated the paternalistic policies of the Roosevelt administration and the terminationist policies of the Eisenhower administration and made a public commitment to a new era in Federal Indian policy. The Nixon administration, in fact, gave Indian issues a high profile. Vice President Spiro Agnew chaired a White House Council on Indian Affairs, and Presidential Counsel Leonard Garment was a visible and active contact point within the administration for Indian issues.

The policy of Indian self-determination was translated into practical application by Congress in a series of legislative acts. Two actions that were specific to the individual tribes involved had widespread implications. These were the restoration of the Menominee Tribe in Wisconsin[44] and the return of Blue Lake to the Taos Pueblo in New Mexico.[45] The restoration of the Menominee Tribe was the culmination of extensive efforts by Indians and their allies directly attacking the policy of tribal termination that had been followed for the previous two decades. This policy was debated and, in effect, repudiated by the restoration of the Menominee Tribe. The return of Blue Lake, a sacred area for the Taos Indians that had become part of a national park, was of symbolic importance beyond its substantial meaning for the Taos Indians. It reflected, in direct contravention to two centuries of cultural elitism, a recognition of Indian cultural and religious rights. Other legislative acts of broad application followed: the Indian Finance Act,[46] the Alaskan Native Claims Act,[47] the Indian Health Care and Improvement Act,[48] and the Indian Self-Determination and Education Assistance Act.[49]

Of major political significance was the creation by Congress in 1975 of the American Indian Policy Review Commission (AIPRC) to:

> Conduct a comprehensive review of the historical and legal developments underlying the Indian's unique relationship with the Federal Government in order to determine the nature of and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians.[50]

The Commission was made up of legislators from areas of significant Indian population and key members of pertinent legislative committees, as well as Indians themselves.[51] Utilizing extensive Indian participation, the AIPRC produced 11 task force,[52]

[39] See chapter 3.
[40] 388 F. Supp. 649 (N.D. Ma. 1975), *aff'd,* 528 F.2d 370 (lst Cir. 1975).
[41] See chapter 4.
[43] President Johnson's Special Message to Congress on the Problems of the American Indian, "The Forgotten American," Mar. 6, 1968, I *Public Papers of the Presidents* §113 (1968–1969).
[43] President Nixon's July 8, 1970, Message to Congress, Recommendation for Indian Policy, H. Doc. No. 91–363, 91st Cong., 2d sess. (1970).
[44] 25 U.S.C. §§903–903(f)(1976).
[45] Pub. L. No. 91–550, 84 Stat. 1437 (1970).
[46] Pub. L. No. 93–262, 88 Stat. 77 (1976), codified at 25 U.S.C. §1451–1451n (1976).
[47] Pub. L. No. 92–203, 85 Stat. 688 (1971), codified generally as amended at 43 U.S.C. §§1601–1651 (1976).
[48] Pub. L. No. 94–437, 90 Stat. 140 (1976), codified at 25 U.S.C. §§1601–1675 and 42 U.S.C. §§234, 1395f, 1395n, 1396d (1976).
[49] Pub. L. No. 93–638, 88 Stat. 2203 (1975) codified at 25 U.S.C. §§450, 450n, 455, 458e (1976).
[50] Pub. L. No. 93–58, 88 Stat. 1910 (1975) codified at 25 U.S.C. §174 note (1976).
[51] The AIPRC was chaired by Senator James Abourezk (D–S. Dak.), with Representative Lloyd Meeds (D–Wash.) serving as vice chair. The other congressional members were: Senator Lee Metcalf (D–Mont.), Senator Mark Hatfield (R–Ore.), Representative Sidney Yates (D–Ill.), Representative Sam Steiger (R–Ariz.), and Representative Don Young (R–Alaska). The Indian members were John Borbridge, Tlingit-Haida from Alaska; Louis R. Bruce, Mohawk-Sioux of New York; Ada Deer, Menominee of Wisconsin; Adolph Dial, Lumbee of North Carolina; and Jake Whitecrow, Quapaw-Seneca-Cayuga of Oklahoma.
[52] Task force studies were undertaken in the following areas: 1. Trust

or subject area, reports and a final statutory report to Congress. The final report, which contained some 206 recommendations for Federal action, adopted a strong stance favoring the sovereignty of the tribes and a trust relationship, asserting that:

1. Indian tribes are sovereign political bodies, having the power to determine their own membership and power to enact laws and enforce them within the boundaries of their reservations; and
2. The relationship which exists between the tribes and the United States is premised on a special trust that must govern the conduct of the stronger toward the weaker.[53]

A strong dissent was issued by Vice Chair Lloyd Meeds, who fundamentally disagreed with the majority definition of tribalism and sovereignty.[54] In Mr. Meeds' view, tribes are Federal creatures for the purpose of administering Federal Indian affairs that no longer possess any powers derived from their own sovereignty. Mr. Meeds' view would also limit the trust relationship to property interests.

Although many interested parties and advocates for and against the tribes thought that neither the majority nor the minority report went far enough or was a strong enough reflection of their positions, the difference between the 10-person majority and the 1-person minority view of the AIPRC report was crucial. Under the majority view, tribal efforts to recapture the reins of government and to operate in day-to-day governmental arenas, such as water and sewer, zoning, taxation, building codes, and the like, were applauded and encouraged.

Much of what has been labeled "backlash" occurred well before the AIPRC reports were issued. The issuance of the final report and the attention that it received in areas of large Indian population, however, was perhaps a turning point in the consolidation of various forces in the conflict over Indian issues.

The Backlash

Non-Indians living on and near Indian reservations organized into fairly small, localized groups during the early to middle part of the 1970s. The substantive issues involved in each reservation setting had specific local significance. They were diverse, ranging from wildlife to taxation, but several generalizations about this organizational activity are apparent. The most extensive activity took place where reservation lands were checkerboarded, that is, many different land ownership patterns and legal statuses were commingled, and where non-Indians resided or had significant financial interests, such as grazing leases, within the reservation boundaries.

Another common factor was the existence of a controversial issue involving tribal powers. It also seems clear that much of the organizational activity of non-Indians resulted from their fear of having any aspect of their lives or property regulated or controlled by Indian governments, which, by definition, were not responsive to or controlled by non-Indians. An underlying assumption was that if the tribes exercised more power, non-Indian interests would be adversely affected. During a Commission hearing, the following exchange occurred during the testimony of a non-Indian who had a business on the reservation:

> COUNSEL. . . . assuming that the court chose to uphold the imposition of the tribal tax and said that it was a proper exercise of tribal jurisdiction. . . . Is that a matter of concern to you?
>
> MR. SNOW. Yes, I would assume that before too long we would be out of business.
>
> COUNSEL. Why do you say that?
>
> MR. SNOW. Well, because, without being able to regulate any government by any people, they can do away with you any time they wish. By being able to tax us, being able to have the say over any of the services that we receive, inspections, any time that they wanted to get rid of us, they could. And it is their aim to claim back every bit of reservation that was originally theirs before it was sold off as tax-fee land.[55]

In 1974 Montanans Opposed to Discrimination was organized around the Flathead Reservation of the Salish and Kotenai Tribes. Jurisdiction over non-Indians was a key issue in its formation.[56] There was similar activity on other reservations; for example, the Quinault Property Owners Association was organized in response to the Quinault Tribe's effort

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Responsibilities and the Federal-Indian Relationship; 2. Tribal Government; 3. Federal Administration and the Structure of Indian Affairs; 4. Federal, State, and Tribal Jurisdiction; 5. Indian Education; 6. Indian Health; 7. Reservation and Resource Development and Protection; 8. Urban and Rural Nonreservation Indians; 9. Indian Law Consolidation, Revision, and Codification; 10. Terminated and Non-Federally Recognized Indians; 11. Alcohol and Drug Abuse. *Final Report*, p. 9.

[53] Ibid, p. 4.

[54] Ibid., p. 567.

[55] Kenneth Snow, testimony, *Seattle Hearing*, vol. I, p. 191.

[56] Blair K. Ricendefer, chairman of the board, Interstate Congress for Equal Rights and Responsibilities, statement, *Seattle Hearing*, vol. II, p. 599.

to establish and apply sanitation and building codes;[57] the Lummi Property Owners Association[58] and non-Indian landowners on the Port Madison Reservation organized around the arrest and attempted prosecution by the Suquamish tribal police[59] of one of their members for a drunken assault on a tribal officer during a tribal celebration.

Perhaps the most well-known of these local organizations was South Dakotans for Civil Liberties, which was a moving force in the creation of a national organization. The formation of this organization and the role it came to play reflects in microcosm much of the cycle of the backlash movement.

South Dakotans for Civil Liberties is a successor organization to the Tri-County Protective Association, which grew up primarily around the Pine Ridge Reservation of the Oglala Sioux. This area is rural and generally very poor, and much of its economic resources, including most of the relatively lucrative ranch operations, are controlled by non-Indians. The reservation was the site of several publicized events associated with Indian activism or radicalism of the 1970s, including the occupation of Wounded Knee by Indians in 1973 and the killing of two FBI agents and an Indian in a 1975 incident.

According to Marion Schulz, a local non-Indian rancher, the Tri-County organization was formed to fill a perceived vacuum in law enforcement in Bennett County, a heavily checkerboarded,[60] mixed land ownership portion of the Pine Ridge Reservation:[61]

> MR. SCHULZ. Well, initially it was because of the problem at Wounded Knee. At a particular point in time, our Governor said, "Good luck, people, you're on your own." Our attorney general had the same opinion. It was at that point in time that our deputy sheriff moved back out of the county into Fall River and there we sat.
>
> COUNSEL. What do you mean, "Good luck, people, you're on your own"?
>
> MR. SCHULZ. Well, we all went into Bennett County the day that the Wounded Knee incident occurred. There was a roadblock and their officer, at that particular point in time, said, "From here on you're on your own, you're out of our jurisdiction. You live there, you're on your own, fellows." We called in the Governor at that particular point in time and he affirmed that. So at that particular point, we formed an organization called Tri-County Protective Association which was simply a defensive organization which was there for one of our people, one of its members. And incidentally, there were tribal members who were also members of this organization. If they had a problem, they would call a neighbor and they would come and try to hold the situation together until you could get someone there.[62]

Essentially, the Tri-County Protective Association was a group of ranchers with citizens band radios and their own weapons who organized. The vast majority were non-Indians and many leased tribal land for their ranching operations. The group, however, was never actually required to function as a defense unit of any sort.[63] It joined forces with another similarly situated group on the Cheyenne River Sioux Reservation to form South Dakotans for Civil Liberties. The individual members shared certain similarities in that they were mostly non-Indian ranchers on or near a checkerboarded Indian reservation. The two reservations, however, had distinctly different histories and reputations.

Cheyenne River, unlike Pine Ridge, did not have a reputation for violence. It did have a long history of stable, albeit aggressive, tribal government, which was nationally respected by both Indians and non-Indians.[64] This tribal government was in the process of exercising and expanding its powers. An attempted exercise of tribal jurisdiction over non-Indians at Cheyenne River[65] was identified as the focal point for organizing non-Indians in the reservation area. Although events such as the stabilization of the law enforcement situation, at least with respect to the fears of non-Indians, and limitation on tribal criminal jurisdiction with respect to non-Indians as deter-

[57] Betty Morris, Quinault Property Owners Association, statement, *Seattle Hearing*, vol II, p. 619; and Kenneth Snow, testimony, *Seattle Hearing*, vol. I, p. 190.
[58] Doug Fuhs, president, Lummi Property Owners Association, testimony, *Seattle Hearing*, vol. I, p. 90.
[59] Frank Ruano, testimony, ibid. p. 275.
[60] U.S., Commission on Civil Rights, *South Dakota Staff Report* (1976), p. 31, table 6.
[61] Subsequent litigation would "diminish" the Pine Ridge Reservation to exclude Bennett County from reservation boundaries.
[62] Marion Schultz, testimony, *Hearing Before the United States Commission on Civil Rights, Rapid City,SOuth Dakota*, July 27–28, 1978, p. 125 (hereafter cited as *South Dakota Hearing*).
[63] Ibid., p. 126.
[64] William Janklow, attorney general, State of South Dakota, testimony, *South Dakota Hearing*, p. 211–15.
[65] Jack Freeman, testimony, *South Dakota Hearing*, pp. 124–25.

mined by the U.S. Supreme Court, would reduce many of the initial concerns of the organizers of South Dakotans for Civil Liberties, the organization persisted. Concerns about jurisidiction or law enforcement were quickly submerged, and the group's focus became the whole fabric of Indian and non-Indian legal and political relationships:

> COUNSEL. What you propose and what your organization has proposed in its literature suggests as an appropriate remedy that Indian tribes be terminated and be at best a social collection—am I reflecting your view correctly?
>
> MR. FREEMAN. I think you are right, inasmuch as you have eliminated the tribal vehicle that provides them a shelter that is not available to the balance of United States citizens. . . .
>
> The freedom of choice must be made available to those citizens of Indian ancestry whether they want to belong to the tribe or whether they want to depart from it.[66]

Essentially local South Dakota figures, such as Jack Freeman (quoted above), a large-scale rancher from Cheyenne River, and Tom Tobin, a part-time State's attorney for Tripp County (Rosebud Sioux Reservation), would become leaders and speakers for what would become a national organization.

Added to these local and statewide organizations, which were concerned with issues that related primarily to Indian tribal existence and exercise of power, was a distinctly different kind of local, and sometimes national, lobbying force—sports and wildlife organizations. Decisions in the States of Washington and Michigan affirming Indian treaty rights to use or harvest natural resources such as fish, game, and wild rice without being subject to State regulation and control generated much emotional controversy. Probably the most controversial decision has been *United States v. Washington,* [67] which recognized in the treaty tribes a collective right to 50 percent of the annual salmon catch free from virtually all State regulation and interference.[68] This decision recognized within the tribes a role in the management of the resources, a role that State governments in the 20th century had largely taken unto themselves and a role often dominated by sport or commercial groups.

All user groups involved with salmon and steelhead, a related species highly prized by sportfishers, opposed the Indian rights recognized by the Federal court system. These groups, and there are many—trollers, seiners, gillnetters, charter boat operators, canners, plus the various sport groups—maintained that Indian rights threatened the resources, and they coalesced with other groups such as South Dakotans for Civil Liberties and Montanans Opposed to Discrimination to form the Interstate Congress for Equal Rights and Responsibilities (ICERR). Howard Gray, founder and an activist in the natural resources area, when asked why the ICERR was formed, said:

> [m]y initial information and activity in this respect was from the Boldt decision (*United States v. Washington).* . . .I was called to Montana to give a discussion of the Boldt decision on the provision I would listen to the problems of the people. . . .I went to Polson, Montana. . . .At that meeting, there was 2,000 residents, and after my discussion of the Boldt decision, listening to their problems, we came to the conclusion that there was mutual problems and what we were to do about it. . . .After that meeting, we decided there's problems in South Dakota, there's problems in Montana and Washington, let's find out where the other problems are. We spent 6 months investigating, writing letters, taking trips, and on February 2, 1976, we met in Salt Lake City, Utah, in which there was representatives from 10 Western States that were vitally interested in the problems mostly of Indian jurisdiction.
>
> These representatives were schoolteachers, they were attorneys, they were State representatives, they were mayors of small towns, they were a cross section of the population. We listened, we recorded, and from that grew the Interstate Congress, and since that time, we now have 18 States.[69]

The ICERR became known as the major backlash organization, and it was given substantial press coverage, particularly in reservation areas.[70] A major publication of the organization presented its view of Federal Indian relations:

[66] Ibid., p. 130.
[67] 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976).
[68] See chapter 3.
[69] Howard Grey, National Board of Directors, Interstate Congress for Equal Rights and Responsibilities, testimony, *Seattle Hearing,* vol. I, pp. 257–58.
[70] See, e.g., assorted clippings from *Roosevelt Standard* (Utah) and *Rapid City Journal* (South Dakota) in Commission files.

- The constitutional rights of all Americans must supersede treaty rights of some Americans.
- Indian reservations shall not be enlarged by boundary changes, by grants, by the power of eminent domain, or by any other means.
- The jurisdiction of tribal governments over nonmembers of the tribe, who have no vote or voice in tribal governments, should be prohibited.
- Members of Indian tribes should not have the right to participate in nontribal government unless they are subject to the laws and responsibilities.
- Grants of public funds to any group of people based upon their race and denial of funds to any other group because of their race must be prohibited.[71]

The publication is largely a series of questions and answers purporting to provide information concerning what is characterized as "one of the most misinformed and uninformed problems facing both Indians and non-Indians living in states having an Indian population."[72] The information provided is advocacy information designed to support the propositions listed above. For example, the first question and answer reads:

> Q. How do you define an Indian tribe?
>
> A. It is a corporate entity run by a few individuals.[73]

The answer is limited and technically correct for many tribes as well as most States, counties, and cities. But as applied to any unit of government the answer simply misses or avoids the point of governmental power. Regardless of where the debate leads to on the extent of governmental power, whether it is inherent or delegated, whether it is over territory or only over certain categories of individuals, the fact is that tribes are governments, and any answer that ignores that is misleading at best. Although the information in the booklet varies considerably, from statistical data to political opinions, its basic message is that tribes, dominated by a few individuals, are relatively affluent entities nurtured by a welfare system that inhibits individualism. The American judicial system is opposed as being prone to emotionalism, and the goals of the organization are mainly to be pursued through the Congress, which is viewed as being more reasonable than the courts.

A major issue between the Interstate Congress for Equal Rights and Responsibilities and others in the debate over national Indian policy has been the diametrically differing view of civil rights as postulated by the Federal judiciary and the one advanced by the leadership of the ICERR:

> We seek just one thing, that is equal rights for all people living under the Constitution of the United States and the 14th amendment. . . .the 14th amendment gives equal rights for all people; that's all we're requesting.[74]

The Supreme Court of the United States has specifically addressed the issue of whether specialized treatment of Indians by the Federal Government is unconstitutional racial discrimination. The clear answer of the Court was that it is not. For the purpose of dealing with the Federal Government, Indian tribes are not racial groupings but rather political groupings—governments.[75] This is the point that was misinterpreted in the question and answer quoted from the ICERR publication. In this reasoning, the way things have "always been done" is elevated to a constitutional right. No judgment is apparently made as to whether "always" was ever or is currently appropriate. The Constitution of the United States does not mandate identical treatment of differently situated groups. It does require that government have acceptable reasons for differing treatment; the more suspicious the difference or the treatment, the more justification required. Where any aspect of race is involved, the justification required is very great.

Political Effects of the Backlash

The civil rights vocabulary was misapplied with enthusiasm by local and national political figures. Although the Federal Government has been treating Indians differently from non-Indians since its inception, this fact, newly discovered in the decade of the 1970s, fueled much of the debate. The attorney general of Washington State, for example, termed Indians "supercitizens" and said:

> We are actually pondering a double society. . . .we must obtain justice for the Indians but not at the risk of injuries to non-Indians.
>
> . . .we are concerned with what we consider to be special rights, particularly those created by

[71] Interstate Congress for Equal Rights and Responsibilities, *Are We Giving America Back to the Indians?* (Winner, South Dakota, 1976).
[72] Ibid., p. 1.
[73] Ibid., p. 3.
[74] Grey Testimony, *Seattle Hearing*, vol. I, p. 258.
[75] Morton v. Mancari, 417 U.S. 535 (1974).

> treaty, which bear no relationship whatsoever, now or in the future, to past discrimination and which simply substitute one form of what we would consider to be invalid discrimination for another.[76]

Although it is clear that State and local officials in reservation areas reacted strongly to these issues, it is not possible to determine how much of the reaction is attributable to constituent pressure and how much resulted from a perceived threat to the interests of State and local governments. It is clear that both factors were operative. The Western Conference of Governors, the Western Conference of State Attorney Generals, and the Western Conference of State Tax Administrators all began to turn considerable attention to Indian issues. Economics were obviously an issue that permeated much of the States' concern. Competition with tribes for grants that States and localities used to receive unopposed created some strain, as did the increased competition and need for tax revenues. Fred Mutch, mayor of Toppenish, Washington, located on the Yakima Reservation, summed up the views of many:

> What I am saying is that the resentment among [non-Indian] people in and on the reservation is building by leaps and bounds by these programs [funding to the tribe]. They see what they feel is enormous preferential treatment to the tribes and maybe this treatment is warranted and they have been wronged in the past. I don't know what the final price tag should be but the price tag is being paid today with enormous Federal grants, and through, as I mentioned, this indirect State subsidy by allowing them to do business without collecting a sales tax. The point of my remarks is this, I believe that this is building a white backlash effect. . . .
>
> What I am concerned about is the tremendous amount of pressure that these people will bear on their legislators asking them to hastily pass legislation to deny Indians of these sources of income.[77]

The major result of this backlash would indeed be pressure on government at all levels to do something about the Indian problem. The major arena was to be Congress, where it appeared for a time that even fundamental components of Federal Indian policy were in serious danger. The 1977 congressional session was a high water mark for the introduction of anti-Indian legislation. Representative John E. Cunningham (R-Wash.) proposed the Indian Equal Opportunity Act of 1977.[78] The bill, whose title was at odds with its contents, proposed abrogating all treaties between the United States and the various tribes, terminating the Federal Indian relationship, and abandoning reservations. It was universally opposed by Indians. Another and perhaps more serious effort was introduced by Representative Lloyd Meeds (D-Wash.) the former vice chairman of the American Indian Policy Review Commission. His bill, the Omnibus Indian Jurisdiction Act of 1977,[79] proposed restricting tribal jurisdiction to the narrowest possible limits without altogether abolishing such jurisdiction; State jurisdiction within the boundaries of reservations would correspondingly have been significantly expanded. Another legislative proposal of Representative Meeds was H.J.R. 1, an imposed fishing rights "settlement" whereby the treaty tribes in western Washington would be required to have their rights either bought out or traded "for equivalent rights and values." Representative John D. Dingel (D-Mich.) proposed H.J.R. 206 to recognize a primacy in State power to regulate fisheries vis-a-vis Indian treaty rights. At the time, litigation concerning tribal fishing rights in the Great Lakes, particularly Michigan, was occurring and generating a good deal of local publicity and pressure.

The pressures felt by Congress were also brought to bear on the executive branch, where much of the operational authority in Indian affairs resides. The Washington State congressional delegation sought executive intervention from the Carter administration in the Washington State fisheries case.[80] For a time it also appeared that the pressure on the executive branch would go beyond specific situations and stimulate a negative review of the Federal Government's trust obligations. During this period there was discussion of a review of the trust role by the Department of Justice, which was perceived as ominous by many Indians.[81] Adding to the confusion over the direction that the Department of Justice

[76] Slade Gorton, attorney general, State of Washington, testimony, *Seattle Hearing*, vol. I p. 25.
[77] Fred Mutch, testimony, *Seattle Hearing*, vol. I, p. 62.
[78] H.R. 9054, 95th Cong., 2d sess. (1977).
[79] H.R. 9950, 95th Cong., 2d sess. (1977).
[80] Senator Warren G. Magnuson (D-Wash.) to Secretary of the Interior Cecil D. Andrus, Aug. 4, 1978, *Seattle Hearing*, vol. IV. exhibit 4, p. 6. James Waldo, Assistant U.S. Attorney, testimony, *Seattle Hearing*, vol. III, p. 9.
[81] See, e.g., Costo, Rupert, and Jeanette, *Indian Treaties: Two Centuries of Dishonor* (San Francisco: The Indian Historian Press, 1977), pp. 41-70 (hereafter cited as *Centuries of Dishonor*).

would take, which up to that point had been considered to be the more reliable Federal agency concerned with Indian policy,[83] there was substantial uncertainty about White House policy toward Indians. The Nixon administration, as noted previously, had given Indian issues high profile treatment. In 1977–78, however, it was unclear what the Carter administration's Indian policy would be, and there appeared to be no specific person to deal with Indian affairs at the White House level.[84]

Even on the judicial level, Indians perceived that the backlash forces had had an effect. In 1977 the Supreme Court decided *Oliphant v. Suquamish Tribe*[85] and held that Indian tribal courts do not have inherent criminal jurisdiction to try and punish non-Indians. This issue had been a highly emotional and controversial one on and near Indian reservations and a significant factor in the development of organizations such as the South Dakotans for Civil Liberties.[86] The majority opinion, with its dicta concerning the rights of non-Indians, was greeted as a major victory for the "backlash" point of view.

The Return to Normal

The various "backlash" events came to a psychological head during the 95th Congress in 1977–78. Indians and their allies perceived themselves to be under direct attack. Many believed that the backlash, particularly the legislative component, posed a real danger to the continued existence of the tribes. The rhetoric of the era reflected this view, one commentator stating that "the new war against the American Indian is taking place."[87] A wide range of activities were undertaken by tribes, national Indian organizations, individuals, ad hoc coalitions, and non-Indian organizations generally sympathetic to Indians. Resolutions, a traditional means of dealing with policy issues, were passed by many tribes and tribal organizations, opposing the backlash organizations and even requesting that they be investigated.[87] A variety of media efforts were undertaken, including exposes in Indian newspapers, informational films and media spots, leaflets, and books concerning issues associated with the backlash. Trips to Washington, always a staple in tribal-Federal relations, were increased for tribal officials to meet with Members of Congress and with the executive branch to deal with backlash issues. Perhaps the most dramatic was the "Longest Walk" caravan across the Nation to Washington, D.C., by a coalition of various Indian groups and individuals to dramatize the various treaty abrogation bills then pending in Congress.

Non-Indian organizations that were traditionally favorably disposed toward Indians also joined the effort to counter the backlash. The American Civil Liberties Union made clear that it did not support the arguments against Indian rights predicated on the idea that such rights deny rights to other Americans the "supercitizen" argument). Alvin Ziontz, a Seattle attorney who specializes in Indian law and is a member of the Indian Rights Committee of the ACLU, said:

> [a]s a matter of principle, there is no conflict whatever between Indian treaty rights and the 14th amendment, none whatever. The 14th amendment says simply that if you're going to have different treatment of different groups, there must be a rational basis for that difference. There is obviously a rational basis for the separate treatment of Indian groups, and that basis is the transactions which they made with this nation. They have in effect entered into a contract, and it is no more a denial of my 14th amendment rights that Indians continue to receive the benefits of the agreement they made than it is a denial of my rights that any groups that sold land to the United States Government gets paid for their land. So that's simply, in my view, nonsense. The American Civil Liberties Union does not feel there is any 14th amendment question whatever in upholding Indian treaties. . . .The union has adopted, as a matter of national policy, a commitment to support and uphold Indian treaties.[88]

Similarly, the American Friends Service Committee publicly supported Indian treaty rights and undertook efforts to support its organizational position. At the same time a new non-Indian organization, the National Coalition to Support Indian Treaties, was formed and began to function in the backlash debate. When the 95th Congress ended in 1978, none of the "backlash bills" had passed; in fact,

[83] Robert Pelcyger, Native American Rights Fund, testimony, *Hearing Before the United States Commission on Civil Rights, Washington, D.C.*, Mar. 19–20, 1979, p. 5 (hereafter cited as *Washington, D.C. Hearing*).
[84] Peter MacDonald, chairman, Navajo Nation, interview, March 1979.
[85] 438 U.S. 191 (1978).
[86] Freeman Testimony and Schultz Testimony, *South Dakota Hearing*, pp. 124–39.
[87] *Centuries of Dishonor*, p. 41.
[87] See, e.g., National Conference of American Indians, Litigation Conference Resolution to U.S. Commission on Civil Rights, March 1977.
[88] Alvin Ziontz, attorney, testimony, *Seattle Hearing*, vol. 1, pp. 258–59.

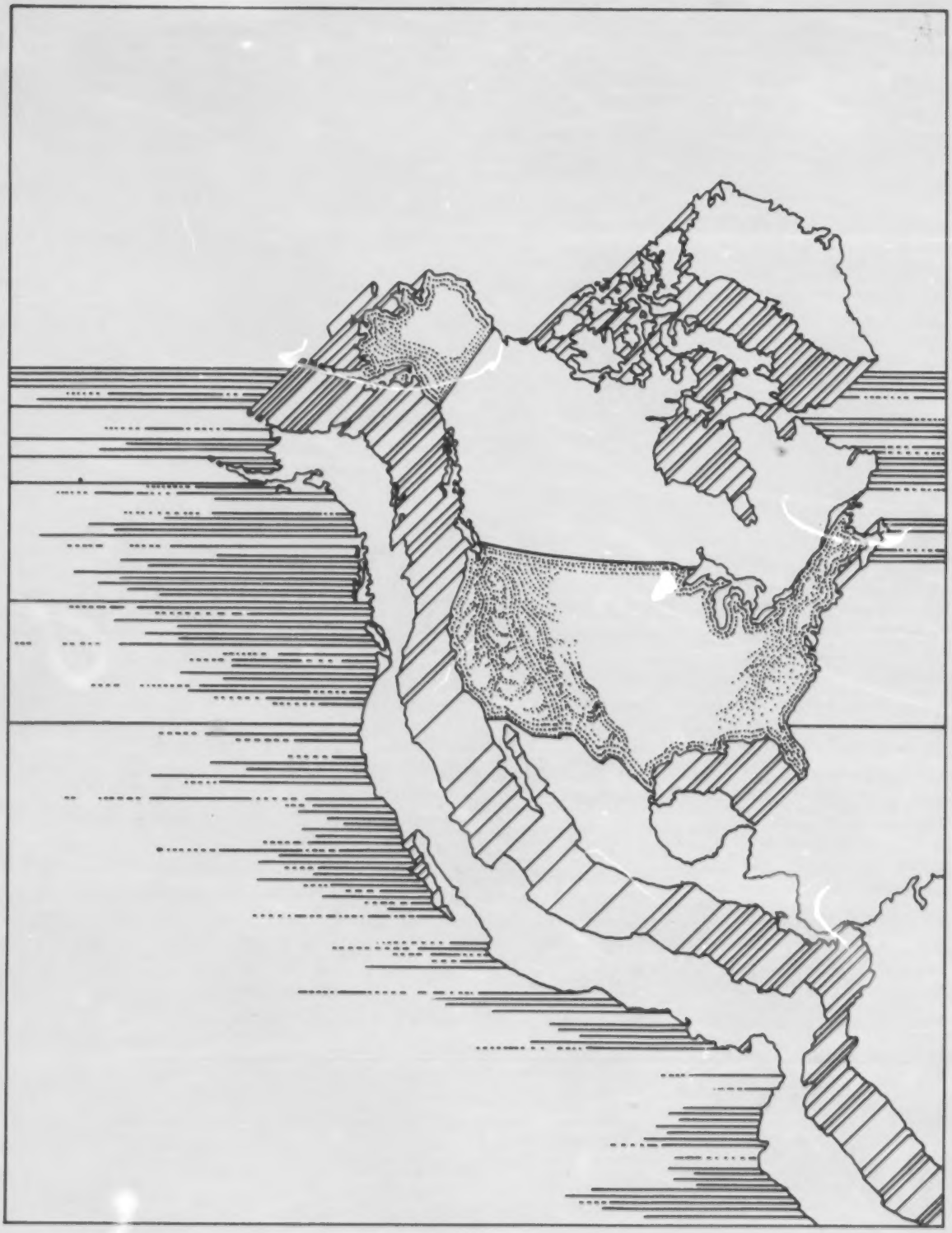
none had ever left committee. The major sponsors of this legislation, Representatives Cunningham and Meeds, were no longer Members of Congress. Lloyd Meeds (D–Wash.) did not seek reelection, and John E. Cunningham (R–Mich.) was defeated. The 95th Congress did, in fact, produce legislation sought by and favorable to Indian interests: the Indian Child Welfare Act,[89] which addressed the serious problem of involuntary separations through foster care, adoption, and removal of Indian children from their familial and tribal settings; and the Indian Religious Freedom Act,[90] which mandated a policy of respecting traditional Indian religions and required Federal agencies to review their programs in order to avoid infringing on traditional Indian religious freedom. Although both acts and other Indian legislation, passed by what had been seen as an unfriendly Congress, are important pieces of legislation, they are not generally of the far-reaching nature that might have been produced by closely adhering to the majority report of the American Indian Policy Review Commission. For example, Congress could have legislatively overruled the *Oliphant* decision,[91] expanded the jurisdiction of tribal courts by amending the Indian Civil Rights Act of 1968,[92] or developed new programs for returning all land within reservation boundaries to trust status. None of these actions were taken. The 95th Congress, therefore, produced a record that was neither overwhelmingly anti-Indian nor pro-Indian.

Similarly, the other branches of the Federal Government acted with mixed results. The *Oliphant* decision of the Supreme Court was followed by several decisions in the very same term that have been viewed as protribal. In *Martinez v. Santa Clara Pueblo,* [93] the Supreme Court held that sovereign immunity, not waived by the tribe, barred a suit by a tribal member against the tribe. The case also clarified the very limited scope of review permitted the Federal courts over actions of tribal governments under the Indian Civil Rights Act of 1968. In *Antelope v. United States,* [94] the Court held that prosecutions by Federal and tribal governments were by separate governments and therefore inherent tribal sovereignty was a significant element in its analyses. Neither case, however, involved the exercise of tribal power with respect to non-Indians.

On the executive side, the Carter administration created the position of Assistant Secretary for Indian Affairs in the Department of the Interior,[95] elevating the status of Indian affairs in the Department. This office, along with Interior, generally, began to be recognized as a positive development. Questions about the Attorney General's positions concerning the trust responsibility were eventually settled without any far-reaching consequences.[96] On the other hand, the Carter administration did aggressively attempt to negotiate away rights it had, as counsel, won in court for the Washington State fishing tribes.[97]

Indians lost prominence in the media as the dire predictions did not come to fruition. Other issues, a worsening economy and conflict with racial and linguistic minorities, would replace Indians as objects of attention as the decade of the eighties began. Although Indians have receded once again from the immediate American consciousness, none of the underlying issues and disputes have changed with regard to Indians. There remains a conflict between Indian tribal interests and those of the dominant society. The conflict is sometimes minimal and easily negotiated or cured. It is sometimes substantial and can involve rights to land, water, mineral resources, timber, wildlife, or even the right to survive as a tribe. These issues are difficult to solve. They can and do have substantial effects on the traditional civil rights problems of Indians, such as police harassment, denial of services, and denial of the right to vote. They are dealt with in a legal-political system that is still little understood but in which the Federal Government plays a crucial role.

[89] Pub. L. No. 95-608, 92 Stat. 3079 (1979), codified at 25 U.S.C.A. §§1901–1921 (Supp. 1980).
[90] Pub. L. No. 951-341, 92 Stat. 469 (1979), codified at 42 U.S.C.A. §1966 (Supp. 1980).
[91] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[92] Codified at 25 U.S.C. §§1301–1341 (1976).
[93] 436 U.S. 49 (1978).
[94] 430 U.S. 641 (1977).
[95] Forest Gerard, Assistant Secretary of the Interior for Indian Affairs, testimony, *Washington, D.C. Hearing,* p. 112.
[96] Robert Pelcyger, testimony, and Phillip S. DeLoria, testimony, *Washington D.C. Hearing,* pp. 5–26.
[97] See chapter 3.



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Chapter 2

Context for Evaluation

Major questions have always existed concerning the role and status of Indian tribes and Indian peoples within the fabric of life in the United States. But these questions have never consistently occupied the forefront of public debate. They have often been ignored.

Even when issues involving Indians have become the focus of public scrutiny, most non-Indians and some Indian people have found their level of knowledge and experience insufficient to evaluate such issues in their legal and historical complexity.

The purpose of this chapter is to contribute to a broadened understanding of problems that have confronted this Nation's people and leadership for centuries without resolution. Acquiring a framework to deal with Indian issues is not simple, and what follows will not provide immediate expertise. The chapter will, however, supply some of the basic tools needed for evaluating issues of Federal Indian policy that are of crucial importance to the relationship between the United States and its original peoples.

Historical Perspective

Precolonial

No explanation of the origins of humankind in the Americas is universally accepted. Many Indian tribes profess that their origins were on the North American continent. Indian legend, tradition, and religion generally support this view of the genesis of life. For example, Navajo legend provides that *Dineh* (meaning, *the people)* came to this continent from beneath the earth, in an area bounded by the sacred mountains of the Navajo, an area that today approximates the Navajo Reservation.[1]

The archaeological record, to the extent that one exists, indicates that Asian people migrated over the Bering Strait (between Alaska and Siberia) to this continent some 40,000 to 100,000 years ago.[2] It is believed that the earliest migration brought pre-Mongoloid people who, through adaptation, became the Mongoloid group later known as American Indians.[3]

Stereotypical views of Indians have often cast them in the role of uncivilized "savages." In reality, the early explorers found that the tribes, organized bands, and confederacies of Indians who inhabited this continent were diverse and frequently proved willing hosts to the European newcomers.[4] Over 500 language groupings existed. The economies of the tribes, generally reflecting local conditions, ranged from subsistence hunting, fishing, and gathering to intensive horticulture and trading.[5] Although most tribal groupings were fairly small, about 100 persons, a number of large tribes and bands were organized in complex political and military confederacies. The total population of the continent before European colonization is not known with exactness;

[1] Martin A. Link, *Navajo: A Century of Progress 1868–1968* (Window Rock, Arizona: The Navajo Tribe, 1968), introduction.
[2] Richard S. MacNeish, "Early Man in the Andes," *Scientific American*, vol. 224, no. 4 (1971), pp. 36, 46.
[3] Eskimos or Innuits, also of Mongoloid stock, are believed to have arrived on this continent in later migrations.
[4] Peter Farb, *Man's Rise to Civilization: The Cultural Ascent of the Indians of North America* (New York: E.P. Dutton, 1978), pp. 249–50.
[5] Ibid., p. 8.

estimates range from less than a million persons to 12 million people.[6]

The Colonial Period: 1494–1776

Although much discussion centers on who "discovered" America, it is clear that the voyages of Christopher Columbus marked a turning point. Whatever earlier explorations or landings may have occurred, they failed to provoke the burning interest among European powers that the expeditions of Columbus produced.[7] A century of adventurism followed.

The Spanish gained an early foothold in North America in the area now known as New Mexico. They instituted the "encomienda," a feudal lord and serf system of colonization. Spanish land grants included the perpetual service of the natives who lived on the land.[8] For the "encomienda" to work, the natives were a necessary, albeit semislave, ingredient. In this aspect Spanish colonization resembled practices of the French, who made Indians a necessary element in an extensive supply and trading system.[9]

Colonization by the British was different. The British came to North America to settle, and they did not view the native population as necessary to colonial life. Neither Indian labor nor trade goods were mainstays of a colonial economy that was to depend ultimately on large numbers of transplanted Europeans. Nonetheless, Indians were important and useful to the early British settlers, who at first were relatively inept at coping with the environment of North America.

Indians almost universally chose to greet the British with friendship and assistance. The early colonies, never far from the brink of disaster, were provided with lifesaving aid by neighboring tribes. The overt friendliness of Indians was viewed by the colonists with inexplicable suspicion. On the edge of starvation, the Virginia Colony accepted relief from Indians with an ambivalence reflected in a contemporary recounting:

> All accounts agree that for some reason the Indians did daily relieve them for some weeks with corn and flesh. The supplies brought from England had been nearly exhausted; the colonists had been too sick to attend to their gardens properly, and this act of the Indians was regarded as a divine providence at that time. . . .What was the real motive for the kindly acts of the Indians may not be certainly known; but it probably boded the little colony a future harm.[10]

The two centuries following the voyages of Columbus saw the emergence of three distinct forms of European exploitation in North America:

1) the extraction of local products and resources for which there was an immediate market in Europe;
2) forced labor through local economic reorganization, usually through the institution of slavery, to procure products for the world market; and
3) the transplantation of European life into America.[11]

By the mid-18th century the British and their colonial system were the dominant European influence in North America. The British (as other European nations) legitimized their acquisition of land through the "doctrine of discovery" and other legal theories, alien European theories that were imposed on the native population. The cornerstone of colonization "rights," the doctrine of discovery gave the "discoverer" of "unoccupied" lands the right to acquire these lands in the face of the competing claims of other European nations. "Unoccupied" meant "unoccupied by Europeans."

"Aboriginal title" was acknowledged by the colonizers as areas that natives considered their home prior to European dominion. The aboriginal Indian title involved an exclusive right of occupancy, a basic concept that would be shaped and reshaped throughout the next several hundred years.[12] An individual European, in this view of land rights, could only obtain land through the action of a colonial nation that had already acquired the land through discovery. The doctrine of discovery has had a succession of interpreters over time—Vattel, Victorio, Las Casas, Sepulveda, Locke, Montes-

[6] J. Nixon Hadley, "The Demography of American Indians," *Annals of the American Academy of Political and Social Science*, vol. 31 (May 1957), pp. 23–24; Alvin W. Josephy, Jr., *The Indian Heritage of America* (New York: Alfred A. Knopf, 1968), pp. 50–51.
[7] Ronald Sanders, *Lost Tribes and Promised Lands: The Origins of American Racism* (Boston: Little Brown and Co., 1978), p. 200.
[8] Ibid., p. 129.
[9] Ibid., p. 203. See also Thomas Forsyth, "The French, British and Spanish Methods of Treating Indians," 1818 manuscript reprinted in *Ethnohistory*, vol. IV, no. 2 (Spring 1957), pp. 210–16.
[10] Alexander Brown, *The First Republic in America* (Boston, 1898), pp. 41–42. Cited in Wilcomb E. Washburn, *Red Man's Land/White Man's Law* (New York: Charles Scribner's Sons, 1971), pp. 34–35.
[11] Vine Deloria, Jr., *Behind the Trail of Broken Treaties* (New York: Dell Publishing, 1974), p. 91.
[12] See Felix S. Cohen, *Handbook of Federal Indian Law* (Albuquerque: University of New Mexico Press, 1942 ed.), sec. 4, pp. 291–94. See also chapter 4 of this report.

quieu, More, and Blackstone—but basically it has been a rationale for the taking of land:

> The white Europeans were to have the Indian lands because the Indians were infidels rather than Christians, hunters rather than farmers, monsters rather than men, or by reason of the generous gifts of European civilization and technology, or by reason of conquest, or by reason of the fact that the king owned everything.[13]

Another significant practice with substantial legal consequences was the use of formal treaties for real estate and other transactions between European sovereigns (and their colonial instrumentalities) and Indian tribes. The British colonies were the legal instrumentalities for effectuating Crown policies in North America.

Relations between individual colonies and neighboring Indian tribes were diverse. Each colony, after its initial need for friendly relations with indigenous tribes, followed its own course. Some colonies were openly hostile to tribes and aggressively attempted to eliminate Indians from their territory. Others sent missionaries and teachers to "train" Indians in farming and European attire, religion, customs, and culture. Europeans, although recognizing certain rights in the tribes, clearly considered themselves superior.

The Crown had no coordinated policy toward North American Indians beyond the bare outlines of treaties and a few operative legal concepts. This gap became but one of the many unresolved issues between the British Crown and the American colonies. The British organized the 1754 Albany Conference to develop a scheme for managing North American Indian affairs.[14] The colonists, however, had a broader agenda and turned the conference to the drafting of the Albany Plan of Union.[15] In this instance and others in the long series of events leading to the Revolutionary War, Indians became factors in a growing conflict.

The Crown took several actions that sought to preserve the military allegiance of some tribes. The Royal Proclamation of 1763 established that the tribes had a right to the protection of their lands, definite borders, and the removal of non-Indians from their lands.[16] In 1768 the Crown established a so-called containment line beyond which no European settlements were to occur. But these protections were routinely breached, and thousands of white settlers moved beoyond the "containment" line.[17]

Early United States-Indian Relations: 1776–1830

Conflict regarding relations with Indian tribes was not resolved by the outcome of the Revolutionary War. The United States replaced the Crown, and the States replaced the colonies, but the issue of local versus national interest and control was not settled. The newly formed Continental Congress reserved to itself the power of "managing all affairs with the Indians not members of any of the States," but also provided that the "legislative right of any State, within its own limits, be not infringed."[18] This essentially codified a dichotomy between national and local views on Indian affairs.

Both the emerging central government and the States agreed that the Indians were needed as allies in the Revolutionary War. As a military imperative they sought to maintain friendly relations with as many tribes as possible. By 1778 the American government had negotiated its first treaty, with the Delawares.[19]

The role of the central government with respect to the tribes and the policy it would follow toward them was a much debated issue in revolutionary times. George Washington played an important role in formulating policy and made clear in his writings that the Federal Government would need to intercede on behalf of the tribes:

> To suffer a wide extended Country to be over run with Land Jobbers, Speculators, and Monopolisers or even with scattered settlers, is, in my opinion, inconsistent with that wisdom and policy which our true interest dictates, or that an enlightened People ought to adopt and, besides, is pregnant of disputes both with the Savages, and among ourselves, the evils of which are easier, to be conceived than described; and for what? but to aggrandize a few

[13] Deloria, *Behind the Trail of Broken Treaties*, p. 89.
[14] George Beer, *British Colonial Policy 1754–1765* (Gloucester, Mass.: Peter Smith, 1958), pp. 18–23 (reprint of 1907 edition).
[15] Albany Plan of Union (1754), reprinted in Henry Steele Commager, ed., *Documents of American History* (New York: Appleton-Century-Crofts, 1958), p. 43.
[16] The Proclamation of 1763, reprinted in Commager, *Documents of American History*, p. 47.
[17] D'Arcy McNickle, "Indian and European: Indian-White Relations from Discovery to 1887," *Annals of the American Academy of Political and Social Science*, vol. 311 (May 1957), p. 6.
[18] Articles of Confederation (ratified and in force, Mar. 1, 1781), Art. IX, 1 Stat. 4, 7 (1845).
[19] Treaty with the Delaware Nation, 7 Stat. 13 (1778).

> avaricious Men to the prejudice of many, and the embarrassment of Government.[20]

The policy that General Washington would ultimately recommend was pragmatic:

> I am clear in my opinion, that policy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country. . . .In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expence [sic], and without that bloodshed. . . .[21]

Washington's advice, accepted by a Nation that was exhausted and weak, was codified as a proclamation of the Continental Congress on September 22, 1783. The Ordinance for the Regulation of Indian Affairs followed in 1786 and in 1787, the Northwest Ordinance. This often quoted and much violated document expresses the following:

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.[22]

When the Revolutionary War ended in 1783,[23] the United States embarked on a round of treaties with its former allies as well as with the tribes that had aligned themselves with the British.[24] The United States Constitution, ratified in 1789, confirmed the Federal role in Indian policy by assigning Congress the authority to involve itself in Indian affairs.[25] Through the treaty process the United States would acquire both lands and legal responsibilities; the tribes would cede lands and obtain Federal commitments in return. It was believed to be in the clear interest of both the United States Government and the Indian nations, under the military circumstances of the era, to live without war and by contract. Between the end of the French and Indian War (1763) and the end of the War of 1812, the Indian nations were secure in the use and occupancy of their lands. They "in effect parlayed their claims to land into claims for services from the new American government."[26] The treaty process would continue for almost a hundred years and would acquire millions of acres of land for the U.S. Government to provide to non-Indian settlers. The treaties also built a reservoir of material and political promises to the tribes.

The quest for land for the use of non-Indian settlers took on new impetus at the turn of the 19th century. The Louisiana Purchase in 1803[27] and the acquisition of Florida in 1812–19 doubled the United States in size. With this expansion, coupled with the consolidation of military and political strength by the new government and the development of the philosophy of "manifest destiny,"[28] Indian tribes faced a dramatic and damaging change in Federal Indian policy.

The Removal Era: 1830–1850

The eastern tribes, particularly those in Georgia, faced continuing pressures from State and local authorities to give up their lands and political status. Major court battles were fought.[29] Influential leaders of the day proposed moving the eastern tribes to the western territories. Thomas Jefferson proposed a constitutional amendment to exchange the Indian land east of the Mississippi for land west of that boundary. This amendment failed, but subsequently congressional authorization was obtained on the same question.[30] The western area to which Indians were to be moved was then considered uninhabitable by white people.

The political-military realities between the tribes and the United States had shifted by this period, and the tribes were unable to resist removal. The

[20] George Washington, letter to James Duane, Sept. 7, 1783, excerpted in Francis Paul Prucha, ed., *Documents of United States Indian Policy* (Lincoln: University of Nebraska Press, 1975), p. 1.
[21] Ibid., p. 2.
[22] The Northwest Ordinance, July 13, 1787, reprinted in Commager, *Documents of American History*, p. 131.
[23] Definitive Treaty of Peace with Great Britain, Sept. 3, 1783, Great Britain-United States.
[24] See, e.g, numerous treaties in vol. 7 of Statutes at Large.
[25] U.S. Const. art. I, §8, cl. 3.
[26] Kirke Kickingbird and Karen Ducheneaux, *One Hundred Million Acres* (New York: Macmillan, 1973), p. 7.
[27] Treaty with France, Apr. 30, 1803, 8 Stat. 200 (1846).
[28] Manifest destiny has been characterized as "expansion, prearranged by Heaven, over an area not clearly defined." Frederick Merk, *Manifest Destiny and Mission in American History—A Reinterpretation* (New York: Vintage Books, 1963), p. 24.
[29] See discussion of Worcester v. Georgia and Cherokee Nation v. Georgia, in following section, "Legal Concepts of Federal Indian Law."
[30] Act of Mar. 26, 1804, 2 Stat. 283, 289; *see* S. Lyman Tyler, *A History of Indian Policy* (Washington, D.C.: U.S. Department of the Interior, 1973), p. 54.

euphemistic "exchange of lands" began in 1817 and continued until mid-century. Thousands of Indian people, almost the entire Indian population that had existed in the southeastern United States, were moved west. The first removal treaty, following soon after the Indian Removal Act of 1830,[31] was the Treaty of Dancing Rabbit Creek with the Choctaw Nation.[32] Although removal was theoretically based on the consent of those removed, it is clear that the eastern tribes were coerced. The ideal of "progress" was invoked to rationalize the forced migrations as inevitable and to obscure the material greed of American expansionism.[33] This period has been described as "one of the blackest chapters in American history":

> Tens of thousands of helpless Indians, many of whom had white blood, were wholly or partly civilized, and owned homes, livestock, and farms, suffered incredible hardships. . . .All their efforts to halt or reverse the government's policy failed, and in the end almost all the members of each of the tribes were removed to different areas in the present State of Oklahoma. Some of them went reluctantly but without defiance; others went in chains. Most of them steamed westward under the watchful eyes of troops who made sure that they kept moving.[34]

Some tribes did remain in the East. The Nation for the most part, however, acted from this time on as if no Indians existed east of the Mississippi.

The assimilationist movement grew in tandem with the policy of removal. Thomas Jefferson was one of the major supporters of the view that with adequate resources and coaxing Indians could be "civilized" and live in harmony with their white neighbors.[35] The responsibility of civilizing Indians fell to the various benevolent societies and missionary organizations. Until the end of the War of 1812 the missionary effort had been hampered by a lack of funding and a clear sense of direction. The change in national mood accompanying removal led to the establishment in 1819 of a Civilization Fund,[36] which provided an annual appropriation from Congress to these organizations and gave impetus to the assimilationist movement. The removal period saw the massive movement of missionary stations to west of the Mississippi. From this vantage the missionaries "directed their attention to Indians indigenous to the Indian territory as well as to regaining the confidence of their former eastern charges."[37]

Indians were seen as being "historically anterior and morally inferior" to Protestant Christian settlers, and with expectations of their demise as a people, there was pressure to civilize and Christianize them before it was too late.[38] Large and small missions were strung out across America. They were to provide the Indians with European concepts of work, time, savings, and Christian orthodoxy to the end that "as tribes and nations the Indians must perish and live only as men!"[39]

Mid-Century—Reservations and Wars: 1850–1880

Although land reservations had existed since colonial times, they did not become a primary ingredient in Federal Indian policy until the mid-19th century. Reservations were defined as areas of land, usually within former Indian land holdings, that were set aside for the exclusive use and occupancy of individual tribes or groupings of tribes. Government policy had been to move the tribes westward from areas of white settlement into unsettled territories denoted Indian country. Areas without white occupation and trade were to become scarce after the mid-19th century. Expansion brought newcomers to all parts of the continent. Wagon trains trekked to Oregon and California as early as 1841. Texas joined the Union in 1846, and the Treaty of Guadalupe Hidalgo in 1848 extended the the United States dominion to the Pacific.[40]

The western tribes and the relocated eastern tribes were challenged for land and resources, such as Black Hills gold, by the new white settlers. The United States embarked on an aggressive policy of establishing Indian reservations by treaty. The treaties would secure land for the settlers, set aside preserves for the tribes, and once again promise

[31] 4 Stat. 411 (1830).
[32] 7 Stat. 333 (1830).
[33] Arthur A. Ekirch, Jr., *The Idea of Progress in America, 1815–1860* (New York: Columbia University Press, 1944), p. 42.
[34] Josephy, *The Indian Heritage of America*, p. 323.
[35] Bernard W. Sheehan, *Seeds of Extinction: Jeffersonian Philanthropy and the American Indian* (New York: W.W. Norton & Company, 1974), pp. 5, 42–44.
[36] Act of Mar. 13, 1819, 3 Stat. 516 (1846).
[37] Robert F. Berkhofer, Jr., *Salvation and the Savage: An Analysis of Protestant Missions and American Indian Response, 1787–1862* (Louisville, Ky.: University of Kentucky Press, 1967), p. 2.
[38] Roy Harvey Pearce, *Savagism and Civilization: A Study of the Indian and the American Mind* (Baltimore: Johns Hopkins Press, rev. ed., 1965), p. 74.
[39] Berkhofer, *Salvation and the Savage*, p. 7.
[40] Treaty with the Republic of Mexico, Feb. 2, 1848, 9 Stat. 922 (1851).

material and political assistance to the tribes. Between 1853 and 1856, 52 treaties were negotiated,[41] sometimes peacefully, sometimes not. The desperate saga of the Indian tribes of the Great Plains, the Northwest, and the Southwest has been told in detail elsewhere.[42] It is clear that in the taking of Indian lands any device that was deemed effective was used, including theft, fraud, deceit, and military force. Even those tribes that had been friendly toward the United States were unable to protect their lands.

Throughout the first half of the 19th century Indian tribes, individuals, and their allies had used the political and legal system of the United States to redress grievances. Sometimes this path proved effective. But even in the face of setbacks, the tribes continued to pursue constitutional mechanisms for grievances.

Congress established in 1855 a Court of Claims that allowed private parties to sue the United States for violations of contracts.[43] A number of Indian tribes and individuals subsequently filed suits for treaty violations involving the taking of land. As the suits progressed, Congress perceived the danger of potential Indian claims and amended the Court of Claims statute to exclude those deriving from treaties.[44] Another century would pass before any systematic process would be available for hearing claims of illegal land taking.[45]

Nothing ultimately prevented the taking of Indian lands. Their holdings were reduced, and the tribes were placed firmly in the reservation system. Indians refusing to stay in reservation boundaries were dealt with by military measures. Reservation occupants were placed under total control of a Federal agent-in-charge whose duty was to acculturate and foster the assimilation of the natives. Christian churches also played a major role on reservations. President Ulysses Grant delegated to the churches the right to nominate Indian agents and direct educational activities on reservations.[46] The direct result manifested itself in later years:

> [M]any reservations had come under the authority of what had amounted to stern missionary dictatorships whose fanatic zealousness had crushed Indian culture and institutions, suppressed religious and other liberties, and punished Indians for the least show of independence.[47]

Assimilation and Allotment: 1890–1930

The drive to assimilate Indians into the mainstream of American life by changing their customs, dress, occupations, language, religion, and philosophy has always been an element in Federal-Indian relations. In the latter part of the 19th century and the early part of the 20th century, this assimilationist policy became dominant.

A major thrust of assimilation efforts was to educate Indians in American ways.[48] In 1879 the Carlisle Indian Training School was established by a former military officer. Its philosophy of separating Indian children totally from their Indian environment and forcing them to adopt white ways became the basis for a widescale boarding school movement that eventually removed thousands of Indian children from their cultural settings and families. In addition, traditional tribal governing systems, particularly justice systems, came under strong attack during this period.[49] The Bureau of Indian Affairs established tribal police forces and courts under the administrative control of its agents, the reservation superintendents.[50] These and other efforts were designed to erode the power and influence of Indian leaders and traditions. Everything "Indian" came under attack. Indian feasts, languages, certain marriage practices, dances, and any practices by medicine or religious persons were all banned by the Bureau of Indian Affairs.

The Great Sioux Nation was a focus of much of the assimilation activity, and Black Hills gold pro-

[41] Laurence F. Schmeckbier, *The Office of Indian Affairs: Its History, Activities, and Organization* (New York: AMS Press, 1972), p. 44 (reprint of 1927 edition).

[42] See, e.g., Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of the American West* (New York: Holt, Rinehart, and Winston, 1970).

[43] Act of Feb. 24, 1855, 10 Stat. 612 (1855).

[44] Act of Mar. 3, 1863, §9, 12 Stat. 765 (1859–63).

[45] Nancy Oestreich Lurie, "The Indian Claims Commission Act," *Annals of the American Academy of Political and Social Science*, vol. 31 (May 1957), pp. 56–57.

[46] President Grant's Peace Policy, Extract from Grant's Second Annual Message to Congress, Dec. 5, 1870, reprinted in Prucha, *Documents of United States Indian Policy*, p. 135.

[47] Josephy, *The Indian Heritage of America*, p. 340.

[48] For works on assimilation, *see* Henry Fritz, *The Movement for Indian Assimilation, 1860–1890* (Philadelphia: University of Pennsylvania Press, 1963); Milton Gordon, *Assimilation in American Life: The Role of Race, Religion and National Origins* (New York: Oxford Press, 1964); and Francis Paul Prucha, comp., *Americanizing the American Indians* (Cambridge: Harvard University Press, 1973).

[49] U.S., Congress, American Indian Policy Review Commission, Task Force Four, *Report on Federal, State and Tribal Jurisdiction: Final Report* (Washington, D.C.: U.S. Government Printing Office, 1976), pp. 122–23 (hereafter cited as *Task Force Four Report*).

[50] William T. Hagan, *Indian Police and Judges* (New Haven: Yale University Press, 1966).

vided much impetus for reducing the size of the Sioux Reservation as non-Indians flocked by the thousands into South Dakota. The defeat of Custer and his troops at Little Big Horn in 1876 was a direct outgrowth of the discovery of gold in the Black Hills and tribal resistance to the miners who came seeking it. The Sioux were ultimately forced to cede the Black Hills in 1886. Pressure on the Sioux to give up more land continued up to the time of the allotment legislation, and even then it did not end. In 1889 the Great Sioux Nation was divided into six smaller, generally noncontiguous reservations.[51] At the same time, the Bureau of Indian Affairs banned the practice of the Ghost Dance, a religion promising an Indian messiah that had gained prominence. The 1890 Wounded Knee massacre is now clearly understood as a tragic overreaction on the part of the United States in its efforts to suppress Indian religious practices. Those participating in the massacre, however, were awarded medals at the time.[52]

The latter part of the 19th century was also a period when the traditional Indian means of economic support were no longer viable. Subsistence hunting and gathering, which had supported many nomadic tribes, were precluded by the advent of reservations and the mass destruction of wildlife, particularly buffalo, that had accompanied white westward expansion. Many tribes were forced into economic dependency and a dole system of goods and supplies operated by the Bureau of Indian Affairs. This period of economic hardship was accompanied by widespread and severe health problems.

Even those tribes whose economies were strong were unable to escape efforts to subjugate them. The Five Civilized Tribes, removed from Georgia in the 1830s, had organized themselves economically and politically in a manner similar to the American States and territories.[53] By the latter part of the 19th century, these tribes were at least as self-sufficient as the States and territories, but they were nevertheless stripped of most of their governmental powers in 1898.[54]

All of these factors played critical roles in undermining tribal self-sufficiency, but the single most devastating development was the allotment system. Allotment was advocated as a means of further civilizing Indians by converting them from a communal land system to a system of individual ownership. It was argued that ownership would make farmers out of the "savages." In 1887 Congress passed the General Allotment Act, also known as the Dawes Act.[55] Although many other acts of Congress would follow, the general formula of the Dawes Act set the pattern for allotting Indian reservations. Each family head was to receive 160 acres, and a single person was to receive 80 acres. Title to the land was to be held in trust for at least 25 years. Civilized Indians could end the trust period and receive United States citizenship and fee simple title to their land. Citizenship would be unilaterally granted all Indians in 1924.[56] Surplus lands within the reservation boundaries, lands not allotted or otherwise set aside, were to be sold to the United States and then opened for homesteading. The proceeds from the sales were also to be placed in trust and used by the United States as an account for supplies provided to the Indians.

Allotment and other assimilationist practices received strong support from "friends" of the Indians. Many believed that these policies represented the only alternative to Indian extinction. Not everyone defended the Government's policies, however. Dissenters in Congress and elsewhere pointed out the underlying reality of the period: whites were securing vast quantities of Indian land.

Toward the end of the allotment period, the Federal Government commissioned a major study of conditions on Indian reservations. The study, known as the Meriam Report,[57] enumerated the disastrous conditions afflicting Indians at that time: high infant death rates, high mortality rates for the entire population, appalling housing conditions, low incomes, poor health, and inadequate education. The policy of forced assimilation was judged a failure. The failure was that it had not worked: "It has resulted in much loss of land and an enormous increase in the details of administration without a compensating advance in the economic ability of the Indians."[58] But such criticism did not challenge ultimate assimilationist goals.

[51] The agreement was ratified by Congress in 1877, 19 Stat. 254 (1887).
[52] U.S., Congress, American Indian Policy Review Commission, *Final Report* (1977), vol. 1, pp. 67–68 (hereafter cited as *Final Report*).
[53] Cohen, *Handbook of Federal Indian Law*, pp. 128–29.
[54] The Curtis Act, 30 Stat. 495 (1898).
[55] 24 Stat. 388 (1887).
[56] Citizenship Act of 1924, 43 Stat. 253 (1923-25).
[57] Brookings Institution, Institute for Government Research, Lewis Meriam, Technical Director, *The Problem of Indian Administration* (Washington, D.C., 1928) (New York: Johnson Reprint Corp., 1971).
[58] Ibid., p. 41.

In the wake of the damaging results of the reservation allotments and assimilation efforts, some Indians moved to use the American legal system on behalf of their people. By 1910 a small group of Indian lawyers had emerged to do battle in the courts over the questions of Indian lands, citizenship, allotment procedures, and the enforcement of treaty rights.[59] Even though reservations were orginally conceived of as a means to deprive Indians of their lands, they represented the last remnants of Indian land and, as such, were held sacred by the tribes. Despite the prison-like aspects of life on many reservations, Indian advocates moved to protect this land base.

The Indian Reorganization Act: 1930–1945

The Meriam Report and several other investigations[60] produced major changes in Federal Indian practices. Federal policy would ultimately favor restoration of some measure of tribal self-government and tribal resources. The strategy was to use tribal culture and institutions as transitional devices for the complete assimilation of Indian life into the dominant white society.[61] The major instrument for this policy was the Indian Reorganization Act of 1934,[62] which, with companion legislation affecting the Oklahoma tribes,[63] essentially provided for an end to allotment, for measures to restore Indian land bases, and for establishment of a revolving credit fund to promote economic development. Also included were the regulation of resources, mechanisms for chartering and reorganizing tribal governments, and the establishment of an employment preference policy for Indians within the Federal Government.

The Indian Reorganization Act, however, did not go as far as its advocates would have liked, and several key features were not in the legislation as it finally was passed. The elements lost included an appellate Indian court system, mechanisms to assure tribal independence from bureaucratic control, and a national policy to promote and support the study and understanding of Indian cultures.[64]

Another major development during this period was the passage by Congress of the Johnson-O'Malley Act[65] as a means to promote Federal and State cooperation in the provision of services to Indians, particularly in education. This development involved States more aggressively in Indian affairs and was a natural outgrowth of the Meriam Report's view that the Federal Government had performed poorly as a service provider and that the States had a better record.

Finally, during the Great Depression, the Department of the Interior assisted hundreds of tribes in drafting new constitutions, codes, and governmental structures. These efforts produced essentially standardized approaches promoted by Department of the Interior lawyers. Some land was purchased and returned to tribal control during this time, but the Indian land base remained essentially unaltered. This period for reviving tribal governments was a relatively short one.

The Termination Period: 1945–1965

Probing examination of the living conditions of Indians has periodically served as a stimulus to promote change in the manner in which the Federal Government deals with tribes. The United States Senate in 1943 conducted a survey of Indian conditions[66] and found serious and troubling problems. The Bureau of Indian Affairs and Federal bureaucracy were held culpable for these conditions. The administrative and financial costs of achieving slow progress toward assimilation were viewed as excessive.

Criteria were developed by the Commissioner of Indian Affairs to identify Indian tribal groups that could be removed from Federal aegis.[67] The theory was that some tribes were sufficiently acculturated and that the Federal protective role was no longer necessary. But another development of the same period suggests a less benign interpretation of events—some 133 separate bills were introduced in

[59] Hazel W. Hertzberg, *The Search for An American Indian Identity—Modern Pan-Indian Movements* (Sycracuse, N.Y.: Syracuse University Press, 1971), p. 24.

[60] See *Final Report*, p. 71, for a more detailed account of the investigations and events related to Federal policy change on Indian affairs.

[61] William Brophy and Sophie Aberle, comp., *The Indian: America's Unfinished Business: Report of the Commission on the Rights, Liberties and Responsibilities of the American Indian* (Norman: University of Oklahoma Press, 1966), p. 20.

[62] 48 Stat. 984 (1933–34).

[63] Act of June 26, 1936, 49 Stat. 1967 (1935–36).

[64] *Final Report*, pp. 72–73.

[65] 48 Stat. 596 (1933–34).

[66] U.S., Congress, Senate Committee on Indian Affairs, *Survey of Conditions Among the Indians of the United States, Partial Report*, Document No. 310, 78th Cong. 1st sess., 1943; *Supplemental Report*, Document No. 310, pt. 2, 78th Cong., 2nd sess., 1944.

[67] For a discussion of the development of these criteria by the Commissioner of Indian Affairs and the Senate Civil Service Committee, see Task Force Ten, *Report on Terminated and Nonfederally Recognized Indians: Final Report to the American Indian Policy Review Commission* (Washington, D.C.: U.S. Government Printing Office, 1976), pp. 1632–33 (hereafter cited as *Task Force Ten Report*).

Congress to permit the transfer of trust land from Indian ownership to non-Indian ownership.[68] There was also pressure to terminate particular tribes, such as the Klamaths, who had valuable timber resources, and the Agua Caliente, owners of much of the Palm Springs, California, area. In 1949 the Hoover Commission (although not established to deal with Indian issues) recommended the full and complete integration of Indians into American society.[69]

During the 1950s Federal Indian policy was a three-pronged program involving the termination of tribes over which Federal responsibility was thought unnecessary, the transfer of Federal responsibility and jurisdiction to State governments, and the physical relocation of Indian people from reservations to urban areas. The cornerstone of the termination era was House Concurrent Resolution 108, which declared, "Indian tribes and individual members thereof. . .should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians."[70]

The three-pronged policy was aggressively carried out by Dillon Myer, former director of detention camps for Japanese Americans, who became the Commissioner of Indian Affairs in 1950. The Bureau of Indian Affairs, which had been a target of congressional criticism in 1943, grew in budget and staff as it administered terminationist policies. Between 1954 and 1962, statutes were passed authorizing the termination of more than 100 tribes, bands, or Indian rancherias. Most of those affected were small bands on the West Coast, but two sizable tribes, the Klamaths and Menominees, were also terminated.[71] In all, approximately 12,000 individual Indians lost tribal affiliations that included political relationships with the United States. Approximately 2.5 million acres of Indian land were removed from protected status.

Self-Determination: Post-1965

Beginning with the Johnson administration, the Federal Government began to reject termination. The policy that subsequently emerged in the Nixon administration has been labeled "self-determination." It is a policy that favors maintaining the Federal protective role, but providing at the same time increased tribal participation and functioning in crucial areas of local government. Many recent developments are discussed in chapter 1 and are not repeated here. Since 1965 support for tribes, financially and technically, has shown progress.

Legal Concepts of Federal Indian Law

Overview

There is a relatively consistent body of law whose origins flow from precolonial America to the present day. This body of law is neither well-known nor well-understood by the American public. Federal Indian law—or, more accurately, United States constitutional law concerning Indian tribes and individuals—is unique and separate from the rest of American jurisprudence. Analogies to general constitutional law, civil rights law, public land law, and the like are misleading and often erroneous. Indian law is distinct—it encompasses Western European international law, specific provisions of the United States Constitution, precolonial treaties, treaties of the United States, an entire volume of the United States Code, and numerous decisions of the United States Supreme Court and lower Federal courts.

Although the precise origins for many operative concepts in Indian law are murky and the perimeters are not measurable with ultimate precision, they can be broadly identified. Knowledge of some of these concepts is a basic prerequisite to an understanding of Indian affairs.

Indian tribes are governmental units that have a "special" political (trust) relationship with the government of the United States.

In the 1830s the Supreme Court of the United States decided a series of cases that form the analytical framework upon which Indian law rests today. The cases arose in a situation that has been repeated many times in this nation's history, and one that has its current-day counterparts. The State of Georgia and the Cherokee Nation, located within the geographic boundaries of Georgia,[72] were in conflict. Although all of the original 13 colonies had explicitly transferred whatever authority they once had with respect to Indian tribes and claims on tribal land to the Federal Government in the Constitution, the State of Georgia was attempting to dominate and destroy the Cherokee Nation by imposing its laws

[68] Ibid.
[69] Commission on Organization of the Executive Branch of the Government, *Indian Affairs: A Report to Congress* (Washington, D.C.: U.S. Government Printing Office, 1949), p. 65.
[70] H.R. Con. Res. 108, 83rd Cong., 1st sess., 67 Stat. B132 (1953).
[71] *Task Force Ten Report*, p. 1640.
[72] Also within the geographic boundaries of the States of North Carolina, Alabama, and Tennessee.

on the Cherokees. The Cherokees filed suit with the U.S. Supreme Court under Article III of the Constitution, which gives the Court original jurisdiction in cases and controversies involving States and foreign nations. The key issue facing the Court in *Cherokee Nation v. Georgia* [73] was whether the "Cherokees constitute a foreign nation in the sense of the constitution" and hence could maintain the suit. Chief Justice John Marshall's opinion in the case held that the Cherokees, and other tribes, were not foreign nations but rather "domestic dependent nations."[74]

The concept of "domestic dependent nations" is crucial, for it encompasses two major elements: government, or nation-state, status of tribes and a special tribal relationship with the United States. In *Cherokee Nation* Marshall discussed in some detail the political relationship of tribes with the Federal Government. The decision characterizes this special relationship, known as the trust relationship, as one that "resembles that of a ward to his guardian." This "fiduciary" relationship has been consistently recognized by the Federal courts ever since and has been variously described as "special," "unique," "moral," and "solemn."

Although the decision of the Marshall Court was not popular with the citizens of Georgia and others who wanted tribal assets,[75] the decision and others that followed were consistent not only with the policy the United States had been following since its establishment, but also with the policies of the European colonizers who predated the United States. Marshall's opinions in the early cases relied heavily, albeit selectively, on the writings of Emerick Vattel. Vattel's *Law of Nations,* published in 1760, was viewed as the authoritative text in international law and morality by many in the colonial period. Vattel's thesis in simplified terms is: All people who govern themselves are sovereign nations; no nation has a right to more land than its people may settle and cultivate; where a nation has a need for land, it has a right to the excess lands of another; weaker nations that submit themselves to alliances with more powerful nations are still sovereign; and, quoting Aristotle, "the more powerful [nation] is given more honor, and to the weaker, more assistance."[76]

An application of this philosophy is found in the advice given by Secretary of War Henry Knox to President George Washington in a report on July 7, 1789. Knox reviewed the options available to the new republic in dealing with the various tribes and recommended continuation of the policy of treaty making. The benefits for the United States were: (1) the political and military loyalty of the tribes to the U.S. against the European powers, (2) the legal acquisition of lands for white settlers, and (3) a more peaceful frontier with defined boundaries. The tribes would receive recognition of their exclusive right to use and occupy defined geographic areas and the protection of the United States.

These policies, reflected in numerous treaties between the United States and the various tribes, were codified by the first Congress in the Indian Trade and Intercourse Act of 1790.[77] The act prohibited any land transactions with any "Indian nation or tribe of Indians" without the participation of the United States. This statute was recently held to form a basis of the trust relationship in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton.* [78]

In the treaty relationship, tribes commonly divested themselves of external sovereignty—the right to go to war with or make treaties with other foreign powers—in return for the protection of the United States. Not all tribes have treaties with the United States This, however, does not bar the trust relationship. The Supreme Court has made it clear that the trust relationship extends to all tribes with whom the United States has had relations. The court in *United States v. Kagama* [79] spoke of a "duty of protection" owed to tribes by the United States that came about from treaties *and* "the course of dealings of the federal government with them," leaving the tribes in "a condition of weakness and helplessness."[80]

Today, it is generally recognized that the United States has a trust relationship with Indian tribes. The exact limits of the relationship, however, are not entirely clear and perhaps never will be. One commentator has likened the trust relationship to the Bill of Rights in the Constitution: It "cannot be defined with precision in all respects. It is an evolving, dynamic doctrine which has been expand-

[73] 30 U.S. (5 Pet.) 1 (1831).
[74] *Id.* at 17.
[75] Georgia would ultimately win the battle against the Cherokees when the national legislature and Andrew Jackson arranged for the removal of most east coast tribes to the western territories.
[76] Sections 4–6 and 206.
[77] 1 Stat. 137 (1790). Current version at 25 U.S.C. §177.
[78] 528 F.2d 370 (1st Cir. 1975).
[79] 118 U.S. 375 (1886).
[80] *Id.* at 384.

ed over the years as changing times have brought changing issues."

There are three components to the trust relationship: land, tribal self-government, and social services. The first—land—is the clearest and the one about which there is most agreement. Title to Indian land, both tribal and individual, is generally held in trust by the United States. The United States holds technical legal title, while equitable title or the right to use the land is held by the beneficiary—the Indians. Trust lands are to be managed for the benefit of the equitable, or Indian, owners. Damages can be assessed against the U.S. for violations of the trustee's responsibilities. The Secretary of the Interior has been designated as the prime agent of the United States for management of the trust. It is, however, evident that the trust relationship extends to the entire Federal Government and is not limited to the Department of the Interior.

Some observers argue that land and other physical assets are the only cognizable components of the trust relationship. The Department of the Interior and the Department of Justice have at times taken this view. A broader view is found in the recent report of the American Indian Policy Review Commission of the Congress of the United States which argues:

> The purpose behind the trust is and always has been to insure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society. This duty has long been recognized implicitly by Congress in numerous acts, including the Snyder Act of 1921, the Indian Reorganization Act of 1934, the Johnson-O'Malley Act of 1934, the Native American Programs Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975, and the Indian Health Care Improvement Act of 1976. In fact, as early as [1819] Congress established a general civilization fund to aid Indians in achieving self-sufficiency within the non-Indian social and economic structure. (Footnotes omitted.)
>
> The Commission has found that Indian people are unanimous and consistent in their own view of the scope of the trust responsibility. Invariably they perceive the concept to symbolize the honor and good faith, which historically the United States has always professed in their dealing with the Indian tribes. Indian people have not drawn sharp legal distinctions between services and custody of physical assets in their understanding of the application of the trust relationship. Consequently, at its core, the trust relationship has meant to them the guarantee of the U.S. that solemn promises of federal protection for lands and people would be kept.[81]

Indian tribes retain domestically most powers of government.

One year after *Cherokee Nation,* Chief Justice Marshall further detailed the meaning of "domestic dependent nation." In the context of the governmental status of tribes, the case *Worcester v. Georgia* [82] is still the single most important decision in Federal Indian law. It arose as part of the continuing conflict between the State of Georgia and the Cherokees. Georgia by legislation had attempted to abolish the Cherokee government and impose its own laws within tribal boundaries. One such law forbade any non-Indian to live on Cherokee land without a permit from the Georgia Governor. Worcester was one of several non-Indian missionaries living with Cherokee permission on Cherokee land. Georgia prosecuted and convicted the missionaries under State law; they appealed to the U.S. Supreme Court. The Court, with the Chief Justice writing, reversed the convictions, holding that Worcester and other non-Indians were properly subject to tribal law because tribes were "distinct, independent, political communities having territorial boundaries within which their authority is exclusive."[83]

This doctrine—of inherent sovereign powers of tribes—barred the operation of State law within the boundaries of the Cherokee Nation. It was as if New York had attempted to impose its laws within the boundaries of Pennsylvania. The opinion again drew on international law (primarily Vattel's treatise), treaties, the Constitution, and the Trade and Intercourse Act.

The doctrine of domestic tribal sovereignty recognized in *Worcester* is perhaps best described by Felix Cohen in his classic, often quoted work on Indian law:

[81] *Final Report,* p. 130.
[82] 31 U.S. (6 Pet.) 515 (1832).
[83] Federal law, however, is operative.

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[84]

This doctrine, although not intact in its entirety, is still viable law. In *McClanahan v. Arizona Tax Commission,* [85] the Supreme Court viewed tribal sovereignty as the starting point from which interpretive analysis begins:

> The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution. . . .but because it provides a backdrop against which the applicable treaties and Federal statutes must be read.[86]

The case involved an attempt by Arizona to tax the personal income of a Navajo on the reservation. The Court found that Arizona had no such taxing jurisdiction and pointed out that the reservation was subject to the "exclusive sovereignty of the Navajos under general Federal supervision."[87]

In *United States v. Mazurie,* [88] the Supreme Court was again squarely faced with the question of whether tribes are governments. This case involved a tribal regulation that required tribal liquor licenses of any persons selling alcoholic beverages on the reservation. A non-Indian who was refused a liquor license by the tribe continued to operate. A prosecution followed. The Tenth Circuit held that the tribe had no power to regulate liquor licenses because it was not a government. The Supreme Court unanimously reversed the decision of the circuit court. Citing *Worcester v. Georgia,* the Court stated: "[I]t is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territories."[89]

As with any government whose power is inherent rather than specifically delegated, it is not possible to catalog precisely all the powers that the tribes retain. Some powers may not have been exercised in recent years, and others may become apparent only in the context of changing needs and circumstances. It is, however, safe to say that tribal powers include most normal powers incidental to internal governmental functioning, for example, the power to define and enforce criminal laws, the power to determine matters of family law, the power to regulate hunting and fishing, the power to tax, the power to zone and otherwise determine land use, and the power to determine the form of the tribe's governmental institutions.

States do not have inherent power (jurisdiction) within Indian reservations.

In affirming the existence of inherent governmental powers of tribes in *Worcester v. Georgia,* Chief Justice John Marshall recognized an additional fundamental point in Federal Indian law: "The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, *in which the laws of Georgia can have no force."* (emphasis added)

This concept that States do not possess jurisdiction in Indian country was premised on the Court's understanding, pursuant to international law, of tribal status and of the constitutional fact that tribal relations were a matter of Federal jurisdiction, to the exclusion of the States. Prior to the Revolutionary War, the power to deal with Indian tribes resided in the British Crown; such power was transferred to the Federal Government, first in the Articles of Confederation and then in the Constitution. In fact, many of the States admitted to the Union, after the original 13 colonies, came into the Union with the express understanding, contained either in their enabling legislation or in their constitution, that they had no jurisdiction over tribal lands. States and their non-Indian citizens have been viewed as representing interests that were in direct conflict with tribal survival; the Federal Government was viewed as being responsible for protecting tribes from States:

[84] Cohen, *Handbook of Federal Indian Law,* p. 123.
[85] 411 U.S. 164 (1973).
[86] *Id.* at 172.
[87] *Id.* at 175.
[88] 419 U.S. 544 (1975).
[89] *Id.* at 557.

> They [tribes] *owe no allegiance to the States,* and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection. . . .[90]

The original and total proscription against any State jurisdiction has been eroded in several distinct ways in the century and a half since *Worcester v. Georgia.* The foremost manner in which States have obtained jurisdiction with respect to Indian country is through express grants of such jurisdiction from Congress. These grants have occurred in several different ways, including transfer of jurisdiction in particular subject areas to all States[91] and transfers to individual States with respect to specific subject areas and/or tribes.[92] These statutes, and others,[93] have permitted States to exercise jurisdiction over tribal members in reservation areas. Absent such specific congressional authorization, however, it is clear that States have no jurisdiction with respect to Indians and their property within reservation boundaries.[94]

The issue of what jurisdiction States have over non-Indians within reservation boundaries is less clear. In the area of criminal jurisdiction, a line of cases has recognized State jurisdiction over crimes committed on Indian reservations that exclusively involve non-Indians.[95] Similarly, the civil activities of non-Indians can be subject to State jurisdiction.[96] In the criminal area, the Supreme Court recently held that tribal courts do not possess jurisdiction over non-Indians.[97]

The theory of State jurisdiction cases has been that State jurisdiction can operate where Federal action has not preempted the State or where no Federal Indian interest conflicts with State jurisdiction. The Federal courts have recently been utilizing what is known as the "infringement test" to determine whether or not "state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[98]

Congress is viewed in American jurisprudence as possessing plenary power with respect to Indian affairs.

Although Indian tribes were not parties to the United States Constitution, much of Federal Indian law is controlled by a single clause in the Constitution giving Congress the power to "regulate Commerce with Foreign Nations, and among several states, and with the Indian Tribes." This single clause, coupled with other implicit bases, provides Congress with extraordinary power to legislate, free from most judicial scrutiny, in the area of Indian affairs:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States. . .the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders. . .whether within or without the limits of a state.[99]

This power belongs to Congress and not the executive branch; executive branch agencies have only that power that Congress authorizes.[100]

The language of the commerce clause has been broadly construed to recognize congressional authority in most areas not normally denoted as commerce. This has been accomplished in part by reference to other collateral sources of power. Included in these are the power of Congress legislatively to implement treaties, the political function of the Federal Government as trustee for Indian interests, the power of Congress to spend for the general welfare, and the war powers of Congress.

Although the fact of such congressional power appears to be universally recognized by the courts, knowledgeable commentators, both Indian and non-Indian, have questioned the legitimacy of such sweeping powers. Many Indian leaders have stated their belief that plenary power is premised on military-political fact rather than on natural right or law. Felix Cohen indicated that congressional power

[90] United States v. Kagama, 118 U.S. 375, 384 (1886).
[91] E.g., enforcement of sanitation and quarantine regulations and compulsory school attendance.
[92] E.g., Act of June 8, 1940, ch. 276, 54 Stat. 249 (criminal jurisdiction to Kansas).
[93] Pub. L. No. 83-280 is perhaps the most pervasive transfer of Federal jurisdiction to States outside of the Oklahoma acts.
[94] Bryan v. Itasca County, 426 U.S. 373 (1976).
[95] United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896); and N.Y. *ex rel* Ray v. Martin, 326 U.S. 496 (1946).
[96] E.g., Thomas v. Gay, 169 U.S. 264 (1898).
[97] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[98] Williams v. Lee, 358 U.S. 217 (1959).
[99] United States v. Sandoval, 231 U.S. 28 (1913).
[100] Morton v. Ruiz, 415 U.S. 199 (1973).

may, in fact, be more limited than is generally acknowledged:

> Reference to the so-called "plenary" power of Congress over the Indians, or, more qualifiedly, over "Indian tribes or tribal Indians," becomes so frequent in recent cases that it may seem captious to point out that there is excellent authority for the view that Congress has no constitutional power over Indians except what is conferred by the commerce clause and other clauses of the Constitution.[101]

The plenary power of Congress has both positive and negative consequences for Indian people. On the positive side, pursuant to its trust and treaty obligations, Congress has legislatively created special protections and benefits[102] for Indian tribes and tribal Indians. Some of this legislation, such as employment preferences, if designed for any other group or class of person, might be deemed unconstitutional discrimination. On the negative side, Congress has used its power unilaterally to abrogate Indian treaties,[103] to restrict the governmental powers of tribes,[104] to subject tribes to State jurisdiction,[105] and to terminate tribal political existence.[106]

The plenary power of Congress is subject to few restrictions. Most notably, where tribal or individual Indian rights are taken that can be economically calculated (such as land or fishing rights), the tribe or the individual has a right to just compensation.[107] There is also some authority for the proposition that the Bill of Rights generally applies to congressional authority to legislate in Indian affairs.[108]

The Supreme Court has been the main source both for recognition of plenary power and for narrowly defining the judiciary's role in reviewing congressional enactments. One of the earliest statements on judicial restraint is found in *Johnson v. M'Intosh* [109] where the Supreme Court resolved conflicting claims to Indian land in accordance with Federal law. The Court stated:

> However, this restriction [on judicial review] may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system by which this country has been settled, and be adapted to the actual condition of the two peoples, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.(591-92)

The classic case on plenary power is *Lone Wolf v. Hitchcock.* [110] This case involved the 1867 Treaty of Medicine Lodge between the Kiowas and Comanches and the United States. The treaty provided a specific mechanism whereby "excess" Indian lands could be sold. Congress subsequently enacted an agreement for the sale of Indian lands in direct contradiction of the treaty. The tribes sued to have the sale set aside as violating the treaty and also as having been fraudulently obtained. The Supreme Court specifically refused to look beyond the congressional enactment, which it held abrogated the Medicine Lodge treaty.

In the long history of congressional legislation concerning Indian tribes and individuals, now encompassing an entire volume of the United States Code, there is only one example of a congressional enactment that failed to pass judicial scrutiny.[111] The usual response of the courts to possible abuses of congressional power has been hortatory: "Great nations, like great men, should keep their word."[112]

Indians and Civil Rights

The phrase "civil rights" as commonly used covers a range of rights and privileges that people perceive as belonging to them as citizens of the United States or perhaps as a matter of natural law or right.[113] Some characterizations of civil rights, however, may be broader than the actual constitutional status of these rights.

In this country, the United States Constitution (and statutes passed pursuant to it) is the source for determining the nature of civil rights. The Constitution does not contain a definitive listing of all rights and privileges retained by the people. The fact that such a listing is not there, however, is not a limitation of rights. What the Constitution does

[101] Cohen, *Handbook of Federal Indian Law*, p. 90.
[102] E.g., 25 U.S.C. §45 (1976) (employment preference).
[103] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).
[104] E.g., 25 U.S.C. §1301-41 (1976) (Indian Civil Rights Act of 1968).
[105] E.g., Pub. L. No. 83-280.
[106] E.g., 25 U.S.C. §564 (termination of the Klamath Tribe).
[107] United States v. Creek Nation, 295 U.S. 103 (1935).
[108] Cohen, *Handbook of Federal Indian Law*, p. 91.
[109] 21 U.S. (8 Wheat) 543 (1823).
[110] 187 U.S. 553 (1903).
[111] United States v. Cleveland, 503 F.2d 1067 (9th Cir. 1974). The case involved amendments to 18 U.S.C. §1153 which made State law applicable in a Federal prosecution to assaults by an Indian against an Indian. State penalties were more severe than Federal penalties would be. The Court held that such a scheme, without any government jurisdiction, violated equal protection standards.
[112] F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Justice Black dissenting).
[113] This section deals only with governmental actions and the Constitution. It does not treat the range of Federal and State civil rights statutes or some of the more complex current issues of controversy, such as the intent to discriminate.

provide are restraints on Federal and State government action in certain areas or in particular ways. For example, nowhere in the Constitution is there language that reads "the people have the right to be free from a racially segregated education." However, interpretation of the equal protection clause of the 14th amendment has made public school desegregation a constitutional fact of the last two decades.

The equal protection clause of the 14th amendment is the primary source for determining what constitutes unconstitutional discrimination. The word "discrimination" is connotatively used to refer to differing treatment of groups of people; however, not all discrimination is unconstitutional or necessarily evil. The provision of special education benefits for veterans, for example, discriminates against nonveterans, but it is not unconstitutional. Similarly, the provision of special benefits for Indians discriminates against non-Indians, but, again, it is not unconstitutional.

To determine what is unconstitutional discrimination, it is necessary to examine the scope of the equal protection clause and the standard used by the courts in interpreting it:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

By its terms, the 14th amendment applies only to actions of the States. The Supreme Court has, however, incorporated to some extent the equal protection guarantees of the 14th amendment into the 5th amendment as a proscription against the Federal Government: "While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process."[114]

Generally, equal protection issues arise when some Federal or State action, often legislative but not limited to legislation, treats one class of persons differently from other persons. Three basic parts are involved in an equal protection analysis: the nature of the classification that is used, the nature of the right or privilege that is being affected, and the governmental interest or purpose that is to be achieved. The courts, in a sense, balance these three elements in determining the constitutionality of any governmental action that affects one class of persons differently from another.

Classification

The right of the government to classify persons within its jurisdiction into different classes is well settled. "The Constitution does not require things which are different in fact. . .to be treated in law as though they were the same."[115] The Constitution, however, does require "some relevance to the purpose for which the classification is made."[116] There must be "some rationality in the nature of the class singled out."[117] Any distinction that is arbitrary or invidious is viewed as unconstitutional.[118] This standard of review is known as the "rational basis" standard.

Certain classifications by their inherent nature are deemed by the courts to be constitutionally suspect. These "suspect classifications" include alienage,[119] ancestry,[120] and race.[121] Where the classification is suspect, courts utilize the "strict scrutiny" standard of review.[122] Most times such classifications fail to pass constitutional muster. Suspect classifications are "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose.[123]

The Nature of the Right

The nature of the right that the government is seeking to regulate or vindicate affects the standard of review that will be used by the courts. The inquiry is whether the right involved is fundamental. Currently, fundamental rights include: rights guaranteed by the first amendment,[124] the right to

[114] Frontiero v. Richardson, 411 U.S. 677–680 (1973).
[115] Tigner v. Texas, 310 U.S. 141, 147 (1910).
[116] Baxstrom v. Herold, 383 U.S. 107, 111 (1966).
[117] Rinaldi v. Yeager, 384 U.S. 305, 308–09 (1966).
[118] Avery v. Midland County, 390 U.S. 474 (1967).
[119] Graham v. Richardson, 403 U.S. 365 (1971).
[120] Oyama v. California, 332 U.S. 633 (1948).
[121] McLaughlin v. Florida, 379 U.S. 184 (1964).
[122] *Id.*
[123] *Id.* at 192, quoting in part from Hirabayashi v. United States, 320 U.S. 81, 100 (1943).
[124] Williams v. Rhodes, 393 U.S. 23 (1968).

interstate travel,[125] the right to vote,[126] the right to procreate,[127] and the right of privacy.[128] If a fundamental right is involved, the strict scrutiny standard of review will be utilized. If the right or privilege is not fundamental, then the courts only require that the government action be "rationally related" to the effectuation of a legitimate governmental interest.

Government Purpose

Governments, of course, have no authority to act in any manner beyond their respective constitutions. Within their constitutional authority, governments may seek to achieve a range of objectives, some of which are clearly more important than others. The courts, in a sense, define the status of the governmental interest or purpose when undertaking an equal protection analysis. When the government seeks to regulate a fundamental right, it must show a "compelling interest," and the regulation scheme utilized must be the least restrictive one available.[129]

Simply put, whenever a governmental scheme involves a suspect class or a fundamental right, or both, the courts will require the government to justify its action at the highest level—such justification is frequently impossible and the action may be found to be unconstitutional discrimination. Where neither a suspect class nor a fundamental right is involved, the justification required is less, and frequently can be substantiated. There is, of course, gray area between these levels of review. For example, classifications based on sex are not viewed as suspect; however, such a classification is viewed more seriously than many other classifications, and the courts use a higher standard of review than the rational basis standard but a lesser standard than "strict scrutiny," which is applied to suspect classifications.

Where do Indians fit within the legal concept of the equal protection of the laws? A simple answer is not possible.

Indian Tribes and Equal Protection

As first discussed, the equal protection clause of the 14th amendment applies by its own terms to the actions of States; actions of the Federal Government with respect to the equal protection of the laws are controlled by the fifth amendment. No specific provision of the Constitution is written to regulate the conduct of tribal governments. The courts have held that the constitutional protections people are given against the Federal and State governments do not apply to tribal governments.[130] Although many tribes had provisions[131] in their own constitutions similar to the Bill of Rights, Congress in 1968, under its plenary power, passed the Indian Civil Rights Act.[132] This act applies to tribes similar constitutional standards to those contained in the Bill of Rights and the 14th amendment. The pertinent provision with respect to "discriminatory" action by a tribal government is that tribes may not: "Deny any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without due process of law."[133]

It is clear from the legislative history that, even though in places the language may be identical to constitutional language, the act is to be interpreted in the tribal context. As originally proposed, the Indian Civil Rights Act would have made tribal governments subject to the same constitutional prohibitions applicable to the Federal Government.[134] The act as passed was not identical, but rather a modification of constitutional principles. For example, tribes are prohibited from interfering with the free exercise of religion. However, there is no prohibition against the establishment of religion. Moreover, the act provides the right of counsel only at an individual's own expense rather than the broader right constitutionally available in State and Federal courts.

Although the Indian Civil Rights Act of 1968 has been in existence for a decade, until very recently the Supreme Court had not addressed issues arising under the act. In the interim, numerous lower Federal court decisions had interpreted the scope of the act. Generally, these cases came to Federal court under a theory whereby the Federal courts obtained jurisdiction to hear civil disputes under 28 U.S.C. §1343(4)—injunctive relief for the violation of federally-protected rights.

Recently, the U.S. Supreme Court has squarely addressed the issue of remedies in relation to the

[125] Shapiro v. Thompson, 394 U.S. 618 (1969).
[126] Harper v. Va. Bd. of Elections, 383 U.S. 6631 (1966).
[127] Skinner v. Oklahoma, 316 U.S. 535 (1942).
[128] Roe v. Wade, 410 U.S. 113 (1973).
[129] *Id.* at 155.
[130] See, e.g., Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).
[131] One hundred and seventeen tribes had constitutional provisions. U.S., Congress, *Hearings on Constitutional Rights of American Indians* Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, 87th Cong., 1st. sess., pt. 1 (1961), p. 121.
[132] 25 U.S.C. §1301 *et seq.* (1976).
[133] 25 U.S.C. §1302(8) (1976).
[134] S. 961—968, 89th Cong., 1st. sess. (1965), 111 Cong. Rec. 1799.

Indian Civil Rights Act. In the criminal area, the language of the act specified the availability of a writ of habeas corpus; however, in the civil area the act was silent. In *Santa Clara Pueblo v. Martinez,* [135] the Court decided that the Indian Civil Rights Act does not subject tribes to the jurisdiction of Federal courts in civil actions for injunctive or remedial relief.

The *Martinez* case arose on the Santa Clara Pueblo in northern New Mexico and involved a Pueblo woman married to a Navajo. The tribal ordinance made eligible for tribal membership the children of male tribal members married to nonmembers, but not the children of female tribal members married to nonmembers. Mrs. Martinez and her children sued the Pueblo and its governor in Federal district court, contending that the Pueblo's membership ordinance violated the equal protection and due process provisions of the Indian Civil Rights Act. The Supreme Court's opinion began by reaffirming the theory that Indian tribes possess the immunity from suit traditionally enjoyed by sovereigns and that a "waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed'."[136] Since Congress did not provide an express waiver of sovereign immunity in the Indian Civil Rights Act, or anywhere else, "suits against tribes under the Indian Civil Rights Act are barred."[137] Suit against the Governor of the Pueblo, however, was not barred by the doctrine of sovereign immunity, and therefore the Court addressed the jurisdiction of the Federal courts under the act. To determine "whether a cause of action is implicit in a statute not expressly providing one,"[138] the Court utilized a four-part test.

First, is the plaintiff one of a class for whose benefit the statute was enacted? The Court noted that there was no doubt that plaintiffs, "American Indians living on the Santa Clara Reservation,"[139] are among those to be benefited by the act.

Second, is there any indication of legislative intent, explicit or implicit, either to create or deny such a remedy? The Court concluded that the legislative history of the act suggests "that Congress' failure to provide remedies other than habeas corpus was a deliberate one."[140]

Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy? The Court noted that there are:

> Two distinct and competing purposes. . .manifest in the provisions of the Indian Civil Rights Act: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well established federal "policy of furthering Indian self-government."

Conceding that creating a Federal cause of action would be "useful in securing compliance," the Court nevertheless decided that it would unduly interfere with tribal self-government.

Fourth, is the cause of action one traditionally relegated to tribal law, in an area basically of concern to tribes, so that it would be inappropriate to infer a cause of action based solely on Federal law? The Court concluded that "Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians" and that "Tribal forums are available."[141]

Special Treatment for Indians and Equal Protection

It might seem that government schemes that provide benefits to Indians to the disadvantage of non-Indians would involve a suspect racial classification requiring the strict scrutiny standard of judicial review and probably would not be sustained as constitutional.

This, however, is not the state of the law. This issue was squarely faced in *Morton v. Mancari.* [142] Non-Indian employees of the Bureau of Indian Affairs challenged the statutory policy of Indian employment preference as constituting invidious discrimination based on race. The Court found that Indian preference was not racial:

> The preference, as applied, is granted to Indians not as a discrete racial group, but rather as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.[143]

[135] 436 U.S. 49 (1978).
[136] *Id.*
[137] *Id.* at 59.
[138] *Id.* at 60.
[139] *Id.* at 61.
[140] *Id.*
[141] *Id.*
[142] 417 U.S. 535 (1974).
[143] *Id.* at 554.

Since the classification was not racially based, but rather, in the unique legal and historical context, a political classification, the Court utilized the rational basis standard of review. The governmental purpose to be accomplished in the classification was the fulfillment of the Federal Government's trust responsibility. The Court noted that all special Indian legislation was similarly situated:

> If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire volume of the United States Code [25 USC] would be effectively erased and the solemn commitment of the government toward the Indians would be jeopardized.[144]

The Court had no problem finding that the governmental purpose was rationally related to the separate treatment: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[145]

The Court noted that Congress retained the authority to provide Federal remedies for violations of the Indian Civil Rights Act, if it so chose. The effect of the decision was to invalidate the case law that had developed in the lower Federal courts concerning the substantive meaning of the act's provisions and make clear that for civil matters tribal courts are the exclusive forum for resolving complaints against the operations of tribal governments and their officials.

Where Congress is not acting to further its trust obligations, a different analysis is required. Where Indians are denied benefits made generally available to similarly situated persons, the classic equal protection analysis is pertinent. In that setting, Indians will be considered a suspect classification and the government responsible bears a heavy burden in justifying its classification. For example, the fact that Indians were in some sense "wards" of the Federal Government did not justify a county in Arizona denying the right to vote to members of the Mojave-Apache Tribe.[146] Similarly, San Diego County, California, could not justify its denial of public assistance to indigent Indians because they were reservation residents and entitled to special services:

> Many non-Indians in San Diego County live upon tax exempt property belonging to federal or local government agencies or to religious institutions, but in no such case has this fact been considered a justification for the withholding of any public services. . . .
>
> In no case has the enjoyment of such special rights or privileges served as a justification for the exclusion of any such favored group from participation in the ordinary rights of citizenship, including the right to equal treatment under state welfare laws.[147]

Traditional Civil Rights Problems

Introduction

Traditional civil rights, as the phrase is used here, includes those rights that are secured to individuals and are basic to the United States system of government. They include the right to vote and the right to equal treatment without discrimination on the basis of race, religion, or national origin, among others, in such areas as education, housing, employment, public accommodations, and the administration of justice.

In order to understand where American Indians stand today with respect to these rights, it is important to look at historical developments of the concept of Indian rights along with the civil rights movement in this country. The consideration given to these factors here will not be exhaustive, but rather a brief look at some of the events that are most necessary to a background understanding of this area.[148]

A basic and essential factor concerning American Indians is that the development of civil rights issues for them is in reverse order from other minorities in this country. Politically, other minorities started with nothing and attempted to obtain a voice in the existing economic and political structure. Indians started with everything and have gradually lost much of what they had to an advancing alien civilization. Other minorities have had no separate governmental institutions. Their goal primarily has been and continues to be to make the existing system involve them and work for them. Indian tribes have always been separate political entities interested in maintaining their own institutions and beliefs. Their goal has been to prevent the dismantling of their

[144] *Id.* at 552.
[145] *Id.* at 555.
[146] Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948).
[147] Acosta v. San Diego County, 126 Cal. App. 2d 455, 272 P.2d 92, 98 (1954).

[148] This section does not cover rights of Indians with respect to tribal governments.

own systems. So while other minorities have sought integration into the larger society, much of Indian society is motivated to retain its political and cultural separateness.

Although at the beginning of the colonization process Indian nations were more numerous and better adapted to survival on this continent than the European settlers, these advantages were quickly lost. The colonization period saw the rapid expansion of non-Indian communities in numbers and territory covered and a shift in the balance of strength from Indian to non-Indian communities and governments. The extent to which Indians intermingled with non-Indian society varied by time period, geographical location, and the ability of natives and newcomers to get along with one another. As a general matter, however, Indians were viewed and treated as members of political entities that were not part of the United States. The Constitution acknowledges this by its separate provision regarding trade with the Indian tribes.[149] Indian tribes today that have not been forcibly assimilated, extinguished, or legally terminated still consider themselves to be, and are viewed in American law, as separate political units.[150]

The Racial Factor

An important element in the development of civil rights for American Indians today goes beyond their legal and political status to include the way they have been viewed racially. Since colonial times Indians have been viewed as an "inferior race"; sometimes this view is condescendingly positive—the romanticized noble savage—at other times this view is hostile—the vicious savage—at all times the view is racist. All things Indian are viewed as inherently inferior to their counterparts in the white European tradition. Strong racist statements have appeared in congressional debates, Presidental policy announcements, court decisions, and other authoritative public utterances. This racism has served to justify a view now repudiated, but which still lingers in the public mind, that Indians are not entitled to the same legal rights as others in this country. In some cases, racism has been coupled with apparently benevolent motives, to "civilize" the "savages," to teach them Christian principles. In other cases, the racism has been coupled with greed; Indians were "removed" to distant locations to prevent them from standing in the way of the development of the new Western civilization. At one extreme the concept of inferior status of Indians was used to justify genocide; at the other, apparently benevolent side, the attempt was to assimilate them into the dominant society. Whatever the rationale or motive, whether rooted in voluntary efforts or coercion, the common denominator has been the belief that Indian society is an inferior lifestyle.

> It sprang from a conviction that native people were a lower grade of humanity for whom the accepted cannons of respect need not apply; one did not debase oneself by ruining a native person. At times, this conviction was stated explicitly by men in public office, but whether expressed or not, it generated decision and action.[151]

Early assimilationists like Thomas Jefferson proceeded from this assumption with benevolent designs.

> Thus, even as they acknowledged a degree of political autonomy in the tribes, their conviction of the natives' cultural inferiority led them to interfere in their social, religious, and economic practices. Federal agents to the tribes not only negotiated treaties and tendered payments; they pressured husbands to take up the plow and wives to learn to spin. The more conscientious agents offered gratuitous lectures on the virtues of monogamy, industry, and temperance.[152]

The same underlying assumption provided the basis for Andrew Jackson's attitude. "I have long viewed treaties with the Indians an absurdity not to be reconciled to the principles of our government," he said.[153] As President he refused to enforce the decisions of the U.S. Supreme Court upholding Cherokee tribal autonomy, and he had a prominent role in the forced removal of the Cherokees from Georgia and the appropriation of their land by white settlers.[154] Other eastern tribes met a similar fate under the Indian Removal Act of 1830.[155]

Another Federal Indian land policy, enacted at the end of the 19th century and followed until 1934, that shows the virulent effect of racist assumptions

[149] U.S. Const. art. 1, §8.
[150] See legal section at beginning of this chapter.
[151] D'Arcy McNickel, *Native American Tribalism* (New York: Oxford University Press, 1973), p. 56.
[152] *Final Report*, pp. 52-53.
[153] McNickle, *Native American Tribalism*, p. 56.
[154] *Final Report*, p. 54.
[155] Act of May 28, 1830, ch. 148, 4 Stat. 411.

was the allotment of land parcels to individual Indians as a replacement for tribal ownership. Many proponents of the policy were considered "friends of the Indians," and they argued that the attributes of individual land ownership would have a great civilizing and assimilating effect on American Indians.[156] This action, undertaken for the benefit of the Indians, was accomplished without consulting them. Had Congress heeded the views of the purported beneficiaries of this policy, allotment might not have been adopted. Representatives of 19 tribes met in Oklahoma and unanimously opposed the legislation, recognizing the destructive effect it would have upon Indian culture[157] and the land base itself, which was reduced by 90 million acres in 45 years.[158]

An important principle established by the allotment policy was that the Indian form of land ownership was not "civilized," and so it was the right of the Government to invalidate that form. It is curious that the principle of the right to own property in conglomerate form for the benefit of those with a shareholder's undivided interest in the whole was a basis of the American corporate system, then developing in strength. Yet a similar form of ownership when practiced by Indians was viewed as a hallmark of savagery. Whatever the explanation for this double standard, the allotment policy reinforced the notion that Indians were somehow inferior, that non-Indians in power knew what was best for them, and that these suppositions justified the assertion that non-Indians had the power and authority to interfere with the basic right to own property.

Religion is another area in which non-Indians have felt justified in interfering with Indian beliefs. The intent to civilize the natives of this continent included a determined effort to Christianize them. Despite the constitutional prohibition, Congress, beginning in 1819, regularly appropriated funds for Christian missionary efforts.[159] Christian goals were visibly aligned with Federal Indian policy in 1869 when a Board of Indian Commissioners was established by Congress under President Grant's administration. Representative of the spectrum of Christian denominations, the independently wealthy members of the Board were charged by the Commissioner of Indian Affairs to work for the "humanization, civilization and Christianization of the Indians."[160] Officials of the Federal Indian Service were supposed to cooperate with this Board.

The benevolent support of Christian missionary efforts stood in stark contrast to the Federal policy of suppressing tribal religions. Indian ceremonial behavior was misunderstood and suppressed by Indian agents. In 1892 the Commissioner of Indian Affairs established a regulation making it a criminal offense to engage in such ceremonies as the sun dance.[161] The spread of the Ghost Dance religion, which promised salvation from the white man, was so frightening to the Federal Government that troops were called in to prevent it, even though the practice posed no threat to white settlers.[162]

The judiciary of the United States, though it has in many instances forthrightly interpreted the law to support Indian legal claims in the face of strong, sometimes violent opposition, has also lent support to the myth of Indian inferiority. For example, the United States Supreme Court in 1883, in recognizing the right of tribes to govern themselves, held that they had the exclusive authority to try Indians for criminal offenses committed against Indians. In describing its reasons for refusing to find jurisdiction in a non-Indian court in such cases, the Supreme Court said:

> It [the non-Indian court] tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by *superiors* of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their *savage nature* ; one which measures the red man's revenge by the maxims of the white man's morality.[163] (emphasis added)

In recognizing the power of the United States Government to determine the right of Indians to occupy their lands, the Supreme Court expressed the good faith of the country in such matters with these words: "the United States will be governed by such considerations of justice as will control a Christian

[156] McNickle, *Native American Tribalism*, pp. 80–81.
[157] Ibid., p. 85.
[158] Ibid., p. 83.
[159] *Final Report*, p. 53.
[160] Francis P. Prucha, *American Indian Policy* (Norman, Oklahoma: University of Oklahoma Press, 1964), pp. 33–38.
[161] Federal Agencies Task Force, *American Indian Religious Freedom Act Report* (Department of the Interior, 1979), pp. 5–6.
[162] *Final Report*, pp. 67–68.
[163] Ex Parte Crow Dog, 109 U.S. 556, 571 (1883).

people in their treatment of an ignorant and dependent race."[164]

Another example of racist stereotyping to be found in the courts is this example from the Supreme Court of Washington State:

> The Indian was a child, and a dangerous child, of nature, to be both protected and restrained. . . .True, arrangements took the form of treaty and of terms like "cede," "relinquish," "reserve." But never were these agreements between equals. . .[but rather] that "between a superior and an inferior."[165]

This reasoning, based on racism, has supported the view that Indians are wards of the Government who need the protection and assistance of Federal agencies and it is the Government's obligation to recreate their governments, conforming them to a non-Indian model, to establish their priorities, and to make or approve their decisions for them.

Indian education policies have often been examples of the Federal Government having determined what is "best" for Indians. Having judged that assimilation could be promoted through the indoctrination process of white schools, the Federal Government began investing in Indian education. Following the model established by army officer Richard Pratt in 1879, boarding schools were established where Indian children were separated from the influences of tribal and home life.[166] The boarding schools tried to teach Indians skills and trades that would be useful in white society, utilizing stern disciplinary measures to force assimilation.[167] The tactics used are within memory of today's generation of tribal leaders who recall the policy of deterring communication in native languages. "I remember being punished many times for. . .singing one Navajo song, or a Navajo word slipping out of my tongue just in an unplanned way, but I was punished for it."[168]

Federal education was made compulsory, and the policy was applied to tribes that had sophisticated school systems of their own as well as to tribes that really needed assistance to establish educational systems.[169] The ability of the tribal school to educate was not revelant, given that the overriding goal was assimilation rather than education.

Racism in Indian affairs has not been sanctioned recently by political or religious leaders or other leaders in American society. In fact, public pronouncements over the last several decades have lamented past evils and poor treatment of Indians.[170] The virulent public expressions of other eras characterizing Indians as "children" or "savages" are not now acceptable modes of public expression. Public policy today is a commitment to Indian self-determination. Numerous actions of Congress and the executive branch give evidence of a more positive era for Indian policy.[171] Beneath the surface, however, the effects of centuries of racism still persist. The attitudes of the public, of State and local officials, and of Federal policymakers do not always live up to the positive pronouncements of official policy. Some decisions today are perceived as being made on the basis of precedents mired in the racism and greed of another era.[172] Perhaps more important, the legacy of racism permeates behavior and that behavior creates classic civil rights violations.

Civil Rights—A Dichotomy for Indians

Twenty-five years ago a new consciousness about civil rights in this country began to take hold. Black Americans asserted their right to be free from discriminatory treatment. Constitutional rights to desegregated education were recognized by Federal courts, and there soon followed an era in which Federal statutes were passed to secure the rights of minority individuals to be free of racial discrimination in voting, housing, public facilities, employment, and in the operation of Federal programs. These statutes protected other minority groups as well as blacks, including American Indians.

The attention of American Indians, however, was riveted on a more basic civil rights problem, although it is rarely characterized as such. In 1953 House Concurrent Resolution 108 was passed by the Congress calling for the termination of the special

[164] Missouri, Kansas, and Texas Railway Co. v. Roberts, 152 U.S. 114, 117 (1894).
[165] State v. Towessnute, 154 P. 805, 807 (Wash. Sup. Ct. 1916), quoting Choctaw Nation v. United States, 119 U.S. 1, 27 (1886).
[166] *Final Report*, pp. 63–64.
[167] Ibid.
[168] Peter MacDonald, chairman, Navajo Tribe, testimony, *Hearing Before the U.S. Commission on Civil Rights, Window Rock, Arizona*, Oct. 22–24, 1973, vol. I, p. 18.
[169] *Final Report*, p. 64.
[170] See, e.g., President Nixon's July 8, 1970, Message to the Congress, Recommendations for Indian Policy, H. Doc. No. 91-363, 91st Cong., 2d sess. (hereafter cited as *Recommendations for Indian Policy*).
[171] Ibid; Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3096; U.S., Department of the Interior, *Report on the Implementation of the Helsinki Final Act* (1979).
[172] Robert T. Coulter, testimony, *Hearing Before the U.S. Commission on Civil Rights, Washington, D.C.*, Mar. 19–20, 1979, vol. I, pp. 205–07 (hereafter cited as *Washington, D.C., Hearing*).

relationship between the Federal Government and Indian tribes.[173] It was also at this point that the Federal Government chose to hand much of its civil and criminal jurisdiction over to State governments.[174] This policy of unloading Federal responsibility for tribes came at a time when tribal economies were not strong and tribal governments not well established. Given previous interference with tribal government structures,[175] and destruction of much of the tribal land base,[176] terminating Federal recognition of tribal governments was tantamount to destruction of tribes as political entities.

The battles being fought by and for black Americans at this time, including the right to vote, to go to school, to be employed, to participate in the court system, to acquire housing, and to be served by State and local governments on an equal basis with other Americans were important matters to Indians, but they were secondary. The primary consideration was the right to exist as separate political units, and this most basic right for Indians has no application to the other minority groups in this country, who have no claim to such political status.

Indians clearly were subject to the types of discrimination suffered by other minority groups in this country, but the attention of Indians and the Federal Government was not drawn to Indian civil rights issues. At the beginning of the 1960s, the U.S. Commission on Civil Rights conducted an exhaustive study of the state of civil rights throughout the country. A part of the effort was directed to the traditional civil rights of American Indians. The report concluded as follows:

> Limited as was the Commission's study of American Indians, it disclosed sufficient evidence of unequal treatment under law to warrant action in certain areas and more searching investigation in others. It showed, for example, that some Indians are segregated in schools, and that in some instances needy Indians are denied welfare benefits in programs administered and financed by State and local government. Repeated complaints of unfair treatment by police and courts, and complaints of inadequate law enforcement on reservations in States to which the Federal Government has relinquished jurisdiction, indicate serious problems exist in the administration of justice. While no definitive investigation was made in the areas of housing and employment, such information as was received revealed that in both areas Indians run into barriers similar to those confronting the American Negro.[177]

During the 1960s the battles for civil rights occurred in the streets as well as in the courtrooms of this country. Toward the end of the decade, the American Indian Movement was formed, and it began to utilize some of the confrontation tactics employed by other minority groups at that time.[178] As some Indians were becoming a part of the national civil rights movement, their status received some attention within the Federal Government. In 1970 President Nixon said:

> The first Americans—the Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom.[179]

In 1972 a Department of Justice Task Force was established to assess the civil rights problems of American Indians, "and after six months, that study group found full-scale and widespread racial discrimination against Indians."[180] As a result of this finding and the unique nature of Indian civil rights issues, it was suggested that a separate unit be established within the Civil Rights Division of the Justice Department to deal with Indian civil rights.[181] The Office of Indian Rights was established in 1973, and since that time it has found significant violations of Indian civil rights and has filed lawsuits. Some Justice Department investigations have followed studies of this Commission.

There is ample evidence to indicate that American Indians have in the past and still do suffer discrimination in a variety of settings. The Office of Indian Rights has channeled much of its resources toward attacking barriers to Indian participation in the political process. Voting rights actions have been

[173] H.R. Con. Res. 108, 83d Cong., 1st sess., 67 Stat. B132 (1953).
[174] 18 U.S.C. §1162 and 28 U.S.C. §1360 (1976).
[175] Wheeler-Howard Act (1934), 25 U.S.C. §§461–479 (1976).
[176] Dawes Act (Indian General Allotment Act), ch. 119, 24 Stat. 388 (1887) (codified in scattered sections of 25 U.S.C.) (1976).
[177] U.S., Commission on Civil Rights, *Justice* (1961), p. 155.
[178] E.g., "Alcatraz Island Occupation," *New York Times*, Nov. 21, 1969, p. 49.
[179] *Recommendations for Indian Policy.*
[180] James Schermerhorn, Director, Office of Indian Rights, Civil Rights Division, Department of Justice, testimony, *Washington, D.C., Hearing*, p. 54.
[181] Ibid., pp. 54–55.

brought in Arizona, Wisconsin, Nevada, South Dakota, Nebraska, and New Mexico.[182] In the case brought in Apache County, Arizona, a court-ordered reapportionment enabled Indians not only to exercise their voting rights on an equal basis with non-Indians, but also to gain control of the county due to their greater numbers at the polls.[183] Other cases have cited techniques used against Indians similar to those used elsewhere in the country to keep other minority groups from gaining proportional representation through the electoral process. These include switching from a district to an at-large system of voting, a method that tends to reduce or eliminate the possibility of electing a minority candidate; failing to provide language assistance to non-English-speaking Indians; and misinforming Indians seeking to register to vote, which has the effect of preventing them from voting in the following election.[184]

Administration of justice issues constitute a large subject area within which Indians encounter significant civil rights problems. Some of these involve the way law enforcement officers carry out their duties. For example, the South Dakota Advisory Committee to the U.S. Commission on Civil Rights found evidence of selective law enforcement, harassment, searches without cause, and just general discourtesy toward Indians by some police officers.[185]

Recently the Justice Department brought suit against Roberts County, South Dakota, alleging that its practice of refusing to cross-deputize tribal law enforcement officers was racially based. As a result of the county's action, many non-Indians who violated State law on Indian reservations went unapprehended. The suit, which is now pending in Federal court, seeks an order requiring county officials to cross-deputize Indian officers on the same basis as non-Indian law enforcement officials.[186]

This Commission received allegations of abuse of Indian prisoners in Martin, South Dakota,[187] and in southern Arizona where prisoners had allegedly died from beatings they received in jail.[188] There have also been allegations that in some places Indians were routinely arrested to provide some towns with a cheap labor source as they work off their sentences.[189]

In addition to individual incidents, there are practices in the criminal justice system that work to the disadvantage of Indian defendants. In the Dakotas, for example, Indians are not as likely to become jurors because jurors are selected from voter registration lists in South Dakota and from lists of voters and licensed drivers in North Dakota, practices tending to exclude the many Indians who do not participate in the non-Indian system.[190] Opinions of lawyers and judges operating within that system vary, but some believe that the routine exclusion of Indians from juries negatively affects the ability of Indian defendants to receive a fair trial.[191] The bail system in the Dakotas poses a problem for the many Indians arrested in cities, where they have no close relatives in whose custody they might be placed and own no property as individuals to satisfy bail bond requirements.[192]

Similar systemic problems with the administration of justice are indicated by a statistical study in Oklahoma that caused the Commission's Oklahoma Advisory Committee to conclude that two distinct systems of justice seem to be operating in Oklahoma, one for Indians and another for non-Indians:

> This double standard is reflected in the large number of American Indians incarcerated in

[182] John E. Huerta, statement, *Washington, D.C., Hearing*, vol. II, pp. 133–36; and United States v. San Juan County, New Mexico, Civ. Act. Nos. 79-507JB, 79-508JB (D. N.M. 1980).

[183] Schermerhorn Testimony, *Washington, D.C., Hearing*, vol. I, p. 59.

[184] Huerta Statement, *Washington D.D., Hearing*, vol. II.

[185] South Dakota Advisory Committee to the U.S. Commission on Civil Rights, *Liberty and Justice For All* (1977), p. 39 (hereafter cited as *Liberty and Justice*).

[186] Mary Lynn Walker, Acting Deputy Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Jan. 13, 1981.

[187] Lorelei Means, testimony, *Hearing Before the U.S. Commission on Civil Rights, Rapid City, South Dakota*, July 27–28, 1978, p. 104 (hereafter cited as *South Dakota Hearing*).

[188] U.S., Commission on Civil Rights, *The Southwest Indian Report* (1973), p. 40 (hereafter cited as *Southwest Indian Report*).

[189] Ibid. Robert Philbrick, testimony, *Hearing Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, Washington, D.C., Mar. 7, 1963, p. 898. A new statute, the Civil Rights of Institutionalized Persons (Pub. L. No. 96-247, 42 U.S.C. 1997), passed in 1980, gives the Attorney General of the United States the authority to initiate action on behalf of civilly and criminally institutionalized persons, including Indians, where "egregious or flagrant" conditions violate federally-protected rights. The Civil Rights Division is responsible for implementation of the act. The act authorizes the United States to initiate actions against State and other officials operating facilities where Indians may constitute part of the population, *i.e.*, prisons, jails, juvenile facilities, mental health and mental retardation facilities, and nursing homes. Prior to the enactment of the statute, the Division participated in some existing suits. In Battle and United States v. Anderson, 376 F. Supp. 402 (E.D. Okla 1974), the United States participated as plaintiff-intervenor; in *Battle*, the court enjoined the interference with the rights of Native American inmates in an Oklahoma prison. Similar problems were found in Mississippi, North Carolina, and New Mexico.

[190] *Liberty and Justice*, pp. 33–34; North Dakota Advisory Committee to the U.S. Commission on Civil Rights, *Native American Justice Issues in North Dakota* (1978), pp. 17–18 (hereafter cited as *North Dakota Report*).

[191] *Liberty and Justice*, pp. 33–34; *North Dakota Report*, p. 18.

[192] *Liberty and Justice*, p. 41; *North Dakota Report*, p. 23.

municipal and county jails, and in State correctional institutions. It is also reflected in the large number of Indians convicted of felonies in comparison to the number of Indians arrested for these crimes. Finally, it is reflected in the way Indians perceive the administration of justice.[193]

In Farmington, New Mexico, a bordertown of the Navajo Reservation, similar problems were found by the Commission's New Mexico Advisory Committee. There, data showed disparate patterns in fines and sentencing to the detriment of American Indians.[194] Similar problems are alleged to exist in Alaska as well.[195]

Problems relating to Indian children are another major area of alleged discriminatory treatment. A recent study done for the American Indian Policy Review Commission confirmed the existence and enormity of the child custody problem in Indian country. In addition to boarding schools, State social workers and court systems have removed large numbers of Indian children from their homes for placement in foster care or non-Indian adoptive homes. Judgments whether children were being neglected or insufficiently supported by their Indian parents were made by non-Indians on the basis of non-Indian cultural standards. Similarly, non-Indian standards were applied to proposed foster care or adoptive homes that many tribal homes were too poor to meet. The result was a stream of Indian children being sent to foster homes at rates as high as 20 times the rate for non-Indian children. Of these, in States where records provided the information, 50 percent to over 95 percent of the children were placed in non-Indian homes.[196]

The problem has only recently been addressed by the Congress through passage of the Indian Child Welfare Act of 1978.[197] This act, it is hoped, will end the practice of taking Indian children from their families and reservations against their will in the future.

It has been alleged that another attack on Indian families was made through involuntary sterilization of Indian women. A recent report of the Office of the Comptroller General showed that over 3,000 Indian women of childbearing age had been sterilized at four Indian Health Service (IHS) hospitals between 1973 and 1976. The report did not prove that these sterilizations were involuntary, but did criticize the procedures used to obtain consent. The IHS subsequently modified its consent procedures.[198]

The Michigan Advisory Committee to the Commission on Civil Rights received complaints that caseworkers in a Michigan city were coercing Indian women and others into consenting to sterilization by threatening to deny their eligibility for welfare assistance. The women complaining of this treatment refused to file formal written complaints for fear of retaliation, and the matter was not pursued.[199]

Another subject area in which Indians have faced discrimination is in the way State and local governments spend their money to distribute services to the public. A report of the Michigan Advisory Committee to the Commission on Civil Rights found that the City of Sault Ste. Marie failed to provide municipal services such as adequate drainage, paved streets, street lighting, and fire protection to the predominantly Chippewa Indian section of the city.[200] These are not problems of recent vintage but date back over at least 70 years.[201] More recently, the refusal of the city to provide water and sewer services to a Federal housing project to be located on Indian trust land within city limits brought Justice Department intervention in the form of a lawsuit.[202]

A situation similar to Sault Ste. Marie was pointed out in Winner, South Dakota, where Indian people, largely from the Rosebud Sioux Tribe, are concentrated in particular portions of town. According to sworn testimony, it is very difficult for an Indian to rent housing in predominantly white sections of town, and the Indian section suffers from a lack of municipal services.[203] Currently, the Justice Department and the Lummi Tribe are suing the State of Washington and several local defendants for inter-

[193] Oklahoma Advisory Committee to the U.S. Commission on Civil Rights, *Indian Civil Rights Issues in Oklahoma* (1974), p. 52.
[194] New Mexico Advisory Committee to the U.S. Commission on Civil Rights, *The Farmington Report: A Conflict of Cultures* (1975), app. A.
[195] Complaints on file with the Justice Department's Civil Rights Division.
[196] U.S., Congress, American Indian Policy Review Commission, Task Force Four, *Federal, State, and Tribal Jurisdiction* (1976), pp. 78–88.
[197] 25 U.S.C. §1901 (Supp. 1979).
[198] Comptroller General, letter to Sen. James Abourezk, Nov. 4, 1976, pp. 18–31. The IRS did eventually change the consent procedures.
[199] Olive Beasley, testimony, *Washington, D.C., Hearing*, vol. I, p. 47.
[200] Michigan Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights and the Housing and Community Development Act of 1974, Vol. III: The Chippewa People of Sault Ste. Marie* (1976), p. 78.
[201] Ibid., p. 17.
[202] Huerta Statement, *Washington, D.C., Hearing*, vol. II, p. 137. The statement notes that a settlement was reached and that similar circumstances are at the investigation stage.
[203] John King, executive secretary, Rosebud Sioux Tribe, testimony, *South Dakota Hearing*, pp. 144, 145, 147, and exhibit 11.

fering in the tribe's plan to construct a new sanitary sewer system to serve the entire reservation. Recently, a partial consent order was entered freeing several million dollars previously withheld by the State and earmarked for the sewer construction. The suit continues, however, because the local non-Indian jurisdictions insist they and not the tribe should control the sewer system's operation once completed.[204] Another case, in which the city of Oneida, New York, refused to provide fire and police protection to Indian trust land within the city, was settled by a consent decree requiring the city to provide those services.[205]

Indians encounter discrimination in the delivery of health care services. In addition to the inadequacy of health care and unsafe conditions found to exist on some reservations in Indian Health Service hospitals,[206] non-Indian hospitals have in some areas refused to take Indian patients. An Indian leader whose tribe lives in an urban area in Washington State said:

> The local clinics would not serve Indian people, because public assistance would always say, "Well, that is an Indian Health responsibility,". . .And so, you know, even if the Indian people had their own insurance or had dollars in their hands, the clinics had developed a policy of just not seeing Indians because their bills were such a problem.[207]

In a similar circumstance in New Mexico, a lawsuit was brought to assure that the San Juan County Hospital would not turn away Indians needing medical help and direct them to distant Indian Health Service hospitals. The Department of Justice joined in the lawsuit, and the matter was settled before trial through an agreement by the hospital that it would provide emergency services to Indians.[208]

Similar problems have arisen in Oklahoma and other States as well. Although the Department of Justice has filed two lawsuits and taken other nonlitigative actions in this area, other Federal agencies with civil rights responsibilities have done little. Generally, the civil rights staffs of most Federal agencies have not been able to meet the needs of the Indian community.[209]

Employment is another area where Indians have been the victims of discriminatory policies and practices. The Justice Department is now litigating a case in Federal court where the Government alleges that the city of Farmington, New Mexico, systematically discriminates against Indians (as well as women and Hispanics) in recruitment, hiring, assignment, and promotion in city jobs. Investigations of alleged unlawful employment practices against Indians are underway elsewhere in New Mexico and in Arizona.[210] Other significant discrimination against Indians can be found in areas as diverse as access to consumer credit[211] and public places such as restaurants and bars.[212]

As these examples demonstrate, Indians have been discriminated against in some respects in much the same manner as blacks and other minority groups. The data also indicate that although not much has been done to uncover civil rights violations against Indians and to attack the cause of discrimination, wherever the surface has been scratched, civil rights violations have been shown to exist. At this point, American Indians are only at the beginning of what may become a major effort to assure protection of American Indian rights. As expressed by the Deputy Assistant Attorney General for civil rights:

> It is probably accurate to say that the reservation system has retarded Indian interest in civil rights enforcement so that today this minority group is in a position comparable to that of other minorities in the late 1950s or early 1960s. There is really no Indian civil rights movement comparable to that which blacks forged in the 1960s.[213]

Yet if Indians do demand their civil rights, there is the danger that their separate tribal rights may be overlooked in the process. Some legal remedies developed in the last 25 years to redress the civil wrongs committed by governments and individuals against blacks and other minorities may be inappropriate to the Indian setting. Desegregation of the races, for example, is not a goal of Indian tribes on

[204] Lummi Tribe and United States v. Hallauer, Civ. Act. No. 79-682R (W.D. Wash.)
[205] Huerta Statement, *Washington, D.C., Hearing*, vol. II, p. 137.
[206] U.S., Commission on Civil Rights, *The Navajo Nation: An American Colony* (1975), pp. 128–29; *The Southwest Indian Report*, p. 54.
[207] Ramona Bennett, chairwoman, Puyallup Indian Tribe, testimony, *Hearing Before the U.S. Commission on Civil Rights, Seattle, Washington*, Oct. 19–20, 1977, p. 165 (hereafter cited as *Seattle Hearing*).
[208] Huerta Statement, *Washington, D.C., Hearing*, vol. II, pp. 136–37.
[209] Huerta's Statement and Testimony, ibid.
[210] United States v. City of Farmington, N.Mex., Civ. Act. No. 80-037-C (D. N.M.).
[211] United States v. Great Western Bank, Civ. Act. No.—(D. Ariz.)
[212] United States v. Z & E Enterprises, Civ. Act. No.—(D. N.M.)
[213] *Id.* at 144–45.

reservations if it means the end of the separate political rights and sovereignty that tribes have fought so hard to maintain. Indians want the equal rights due them as citizens of the United States, but not the assimilation that has been periodically forced upon them as the price of the bargain.

Backlash and Traditional Civil Rights Problems

As indicated in the preceding section, civil rights violations and discrimination are not new experiences for American Indians. The historical development of the relationship between American society and American Indians has been one of advancing the interests of the former at the expense of the latter. Denying that American Indians had any rights in the American political system was once justified by the view of Indians as uncivilized or savage beings who were not entitled to rights.

After 1924, however, there could be no doubt that Indians were entitled to all the rights of citizens, because in that year Congress declared them to be, in fact, citizens.[214] This sole act of Congress could not be expected to change racial attitudes overnight, especially where racial and political differences were useful to distinguish Indians as a group for the purpose of maintaining control over them. In 1938, for example, seven States were still denying Indians the right to vote, even though Congress had declared them to be citizens 14 years earlier.[215] New Mexico and Arizona, two States with relatively large Indian populations, continued their resistance for 10 more years until they were stopped by court decisions.[216]

A statutorily based denial of voting rights is a violation of civil rights much more easily detected and cured than discrimination in most other areas. That it could persist despite Federal law to the contrary is evidence that discrimination most likely existed in other settings at the same time.

Contemporary thinking among some Indian tribal leaders equates recent anti-Indian posturing with the new visibility of tribal governments and the recent success of some tribes in the non-Indian court system. For example, Melvin Youckton, Chairman of the Chehalis Tribe in Washington State, said his tribe had experienced an upsurge in negative reaction toward their members in the early 1970s when the tribe succeeded in obtaining a variety of Federal grants and the amounts were reported in local newspapers.[217]

Marian Boushie, a tribal officer of the Suquamish Tribe in Washington, expressed a similar view: "When we became active, all of a sudden there was a great furor, 'My God, where did all these Indians come from?'"[218] She said she had seen her elders treated poorly when she was a child, but they managed to survive by enduring rather than rejecting racist treatment. "[I]t was much easier to stay back in the background and not become noticeable, then you could live there," she said.[219] Now, in this era of tribal visibility, hostility toward tribal members is being more openly expressed. "We have had our windows broken. We have been harassed. We have had our policemen harassed. We have been harassed personally. Our children have been harassed in school."[220]

Much of the "backlash" perceived in Washington State is seen by Indians as tied to the fishing rights controversy, described in detail in chapter 3 of this report. Tribes involved in the fishing rights dispute have reported a "spillover" in a variety of contacts with non-Indians not involving fishing. For example, at the Ferndale School District near the Lummi Reservation, one high school student said she had noticed a change in the attitudes of students toward members of the Lummi Tribe after the Lummis and other tribes in western Washington won recognition of their treaty fishing rights in Federal court.

She also observed that the negative attitudes displayed toward Indian students by some teachers in the school were not new. They predated the recent increase in tensions arising from the fishing rights dispute in her area of the State, she said.

> The attitude of the faculty, of the teachers, has always been there as far as I can remember, and my parents—it seems to exist more with the older teachers and, you know, like the ones that my grandparents have had troubles with are the same ones that my parents are having troubles with today.[221]

In South Dakota, Indians have recently expressed dissatisfaction with the way they have been treated by local non-Indian communities located on or near their reservations. The ongoing and longstanding

[214] Act of June 2, 1924, ch. 233, 43 Stat. 253.
[215] U.S., Commission on Civil Rights, *Justice* (1961), p. 136.
[216] Ibid.
[217] Youkton Testimony, *Seattle Hearing*, p. 156.
[218] Marian Boushie, testimony, *Seattle Hearing*, p. 160.
[219] Ibid.
[220] Ibid., p. 167.
[221] Lillian Phare, testimony, *Seattle Hearing*, p. 120.

nature of today's treatment of Indians by non-Indians in these areas is illustrated by the widely disparate observations of Indians and non-Indians living side by side. In Martin, South Dakota, on the Pine Ridge Reservation, and in Winner, South Dakota, on the Rosebud Sioux Reservation, Indians have risen to protest what they perceive as unequal and second-class treatment by white communities. Indians in Martin and Winner described being treated poorly as customers in local stores where they were followed or talked to in a condescending manner.[222] In Martin, Indians said they were being treated abruptly and with undue suspicion by local law enforcement officers[223] and that, as a general matter, Indians were treated as second-class citizens throughout the town.[224] In Winner, where the Indian population is concentrated in particular sections of the town, Indians alleged that they suffer discrimination in the provision of municipal services. Testimony also pointed out that it was very difficult for Indians to rent houses in the white sections of town.[225] In Winner, the perception of economic discrimination in matters such as obtaining credit and cashing checks induces Indians to take their business elsewhere.[226] Their feeling of discrimination was strong enough to support an Indian boycott of certain businesses in Martin.[227]

Non-Indians living in these areas offered testimony so contradictory that they appeared to be talking about different places. In Martin, a banker and a county commissioner testified that they knew of no discrimination against Indians in that city.[228] In Winner, a retail businessman and the mayor were of the opinion that Indians are treated equally with others and that they are welcome in town.[229]

State and Tribal Relations

Introduction

Relationships between the Indian tribes and the various levels of State, local, and Federal governments have been both dynamic and interconnected. The desires of States and their non-Indian citizens have been directly responsible for many of the fluctuations in Federal policy outlined elsewhere in this report.[230] Similarly, national priorities and approaches to Indians and tribes have had a direct effect on interactions at the State and local level.[231] The relative positions of tribes and States as governmental structures competing to control land, resources, and political jurisdiction have provided the historical basis for conflict between them.

The following, often quoted language of the U.S. Supreme Court describes the political relationship between State, tribal, and Federal governments as it existed nearly a century ago. Although Federal legislation has changed the legal relationship between States and their tribal citizens, the statement still retains significance in tribal-State relations:

> They [tribes] owe no allegiance to the States and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them, and the treaties in which it has been promised, there arises the duty of protection. . . .[232]

The patterns of interaction between Indian tribes and States, which supported the need for Federal protection alluded to in this quotation, were established before the country was created. In colonial times, non-Indians pursued their quest for land and resources among many tribes, some of which possessed considerable military capability. Colonies, and later States, were admonished against allowing citizens to violate agreements or to take land from Indian tribes. At least part of the reasoning behind this Federal policy was that tribes had the ability to, and sometimes did, retaliate forcefully against acts of aggression or violations of agreements made with them.[233] The inability of the colonies to control violations in part led to centralization of the authority to regulate commerce with the tribes in the Articles of Confederation[234] and later in the Consti-

[222] Alice Flye and Lorelei Means, testimony, *South Dakota Hearing*, pp. 96, 97; John King, executive secretary, Rosebud Sioux Tribe, testimony, *South Dakota Hearing*, p. 146.
[223] Flye and Means Testimony, *South Dakota Hearing*, pp. 98, 99.
[224] Ibid., pp. 96, 97.
[225] King Testimony, *South Dakota Hearing*, pp. 144, 145.
[226] Beatrice McLean, testimony, *South Dakota Hearing*, pp. 142–43.
[227] Flye and Means Testimony, *South Dakota Hearing*, pp. 101, 102.
[228] Bruce Hodson and Harold Larson, testimony, *South Dakota Hearing*, p. 95 *et seq.*
[229] Walter Schrammn and Stan Smith, testimony, *South Dakota Hearing*, pp. 153–54.
[230] See first section of this chapter.
[231] E.g., the Federal termination policies of the 1950s placed tribes in a tenuous position with regard to States as compared with the self-determination tribal policies of the 1970s.
[232] United States v. Kagama, 118 U.S. 375, 384 (1886).
[233] For a discussion of this topic see D'Arcy McNickle, *Native American Tribalism* (New York: Oxford University Press, 1973), pp. 49–51.
[234] Articles of Confederation, Art. IX.

tution[235] of the United States. After the Nation was created, Congress exercised its authority to control commerce with the tribes by regulating non-Indian business.[236] Part of the purpose for the national legislation followed the theme of colonial times, "[t]o supervise trade with the Indian tribes, and to discourage individual avarice under conditions which presented unlimited opportunites for corruption and extortion."[237] Through the years, Congress has exerted its authority to control trading with tribes through legislation.[238]

Although the Federal Government has prevented, or attempted to prevent, individuals from dealing unfairly with Indians, the historical development of the Federal role as protector of tribes and their property is counterbalanced by congressional enactments and Presidential policies that at times have facilitated the taking of tribal property. The removal period of the 1830s, during which tribes were taken from their eastern homes, forcibly when necessary, and relocated on western lands, fostered the taking of tribal land for non-Indian settlement.[239]

Federal encouragement of homesteading[240] led to rapid settlement of the West in the mid-1800s. As territories and States were created, there were provisions in the laws creating some of them that removed land set aside for Indians by the Federal Government from territorial or State control.[241]

The pattern did not operate simply, however. As State governments were organized, they began to exert authority within their boundaries, including an assumed right to control the actions of Indians within those boundaries. There were and are great variations in the extent to which different States have asserted rights to control matters relating to Indians. There have also been wide variations in the extent to which the Federal Goverment has acted to protect Indian rights.[242]

Land reserved by tribes through treaties, agreements ratified by Congress, or Executive orders was supposed to be beyond the reach of State governmental authority, but subsequent Federal policies left the tribes vulnerable to State assertions of jurisdiction over portions of tribal land. Principal among these was the allotment policy of the late 19th century. Under this policy the Federal Government divided tribally owned lands into individual parcels to be owned by individual Indians.[243] Many Indians owning land parcels, under a variety of circumstances, parted with their land through sales for needed cash, foreclosures to meet debts, or sometimes trickery in which Indians who could not read English thought they were selling only mineral or timber rights when they signed papers selling land. The ultimate result is that much land passed from Indian to non-Indian hands.[244] This transfer affected not only the individual Indian and non-Indian, but also the tribe that lost the land and the State that gained it. Added to the actual land loss was considerable confusion whether tribal jurisdiction was lost as well. A similar situation illustrating this problem would be the sale of State-owned land to a private individual. Although the individual acquires private ownership rights through the purchase, there is no question that for governmental purposes the land remains a part of the State and is subject to State jurisdiction.

Much litigation has occurred over Indian-owned land being sold to non-Indians, and in some of these cases tribes have lost governmental authority over land transferred to non-Indians.[245] Thorny conflicts over governmental right to tax and zone such land and to exercise civil and criminal judicial authority over it are examples of problems generated by the policy of allotment that pitted tribal and State governments against one another.

The policy of allotment was ended with the Indian Reorganization Act of 1934[246] as part of a new series of Federal policies dealing with Indian matters. The Commissioner of Indian Affairs at that time, John Collier, instituted an era of recognition of Indian tribes as entities to be strengthened (albeit on an American model), not dismantled, as had been the case under previous policy. A decade earlier, Indians who had not already been declared citizens, by legislation directed at certain tribes, were declared

[235] U.S. Const. art. I, §8.
[236] Act of July 22, 1790, ch. 23, 1 Stat. 137.
[237] Cohen, *Handbook of Federal Indian Law*, p. 348.
[238] For a listing of these, see ibid.
[239] Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830).
[240] Congress enacted a series of homesteading statutes during the second half of the 19th century, beginning in 1862 with the Homesteading Act, ch. 75, 12 Stat. 392. The current version of the act is codified in 42 U.S.C. §161 (1976).
[241] See, e.g. An Act to Provide a Temporary Government for the Territory of Idaho, ch. 117, §1, 12 Stat. 808, 809 (1863).
[242] Compare the homesteading policies that resulted in the diminishment of reservation in South Dakota, DeCoteau v. District County Court, 420 U.S. 425 (1975), with the role played by the executive branch in litigating the northwest fishing rights cases in the 1970s (chapter 3).
[243] Indian General Allotment Act, ch. 119, 24 stat. 388 (1887) (codified in scattered sections of 25 U.S.C.).
[244] Ninety million acres were transferred out of Indian hands in 40 years. McNickle, *Native American Tribalism*, p. 83.
[245] DeCouteau v. District County Court, 420 U.S. 425 (1975); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).
[246] 25 U.S.C. §§461–479 (1976).

to be citizens of the United States and the States in which they were found.[247] Recognizing the poor administration of Indian affairs by the Indian Service of the Department of the Interior, Collier promoted a new policy making the new Indian citizens beneficiaries of State and Federal social services programs.[248] A principal piece of legislation to accomplish this result was the Johnson O'Malley Act.[249] Among other things, the act created a program in which States received funds for including Indian children in local school systems and for assisting Indians under State-operated welfare programs.

By reason of these new policies, States and tribes that were at odds in some matters, and were historical opponents, entered the relationship of service provider-beneficiary. Although States were still representing non-Indian interests when in conflict with Indians, more areas were developing where interests coincided. The States had a statutory responsibility toward Indian citizens that added an element of confusion to the adversary relationship they once had and to some extent continued to have.

Federal policy in the 1950s meant more authority for States, but this time at the direct expense of tribes. The Federal Government once again decided that Indians should be assimilated and set about terminating its special relationship with tribes.[250] As part of this process, some State governments were given control over civil and criminal jurisdiction on Indian reservations.[251] The new State authority made the tribes beholden to State government for such basic services as police protection and judicial enforcement. The fact that the Federal Government was no longer supporting tribes and that States now held control over law enforcement as well as provision of educational and social services signaled a shift in power so great that many tribes were politically deactivated.

In the 1970s the Federal policy reversed again toward strengthening tribes as the concept of Indian self-determination was instituted at the Federal level.[252] States that had been assuming judicial authority over Indian tribes under legislation enacted during the termination era were prevented from making further inroads into tribal authority in 1968.[253] As the 1970s began, tribes, with Federal support, began to rebuild weakened governments and to strengthen healthy ones. As they did so, many reasserted tribal authority and rights that State and local governments had taken over under earlier Federal policies that had permitted or encouraged greater State authority over tribes. Again, the stage was set for conflict as State and tribal governments confronted each other over their relative authority to control, govern, and tax the land, resources, and people within their overlapping borders. Such conflicts exist today alongside former conflicting interests that have been adjudicated.

There are also a number of potential conflicts that have been settled through cooperative intergovernmental arrangements worked out to terminate or to avoid costly litigation. Many cooperative relationships have developed without the threat of court action at all. Some States and tribes have found ways to work out disagreements over some issues through arrangements that work to the advantage of both governing entities.

Thus, the positions of the Federal, State, and tribal governments are not fixed. Depending upon the issues and the governments involved, there are intergovermental cooperative efforts as well as complete opposition among tribal and non-Indian governments, and all gradations in between are quite possible.

A Sampling of Conflict

Governments with common territorial boundaries are likely to clash over the authority to govern a resource of common interest.[254] Conflicts of this nature are not confined to adjacent States or localities, however, but also arise between the Federal Government and the States.[255] Such conflicts center on issues of political authority or jurisdiction to govern a particular area or to exercise

[247] Act of June 2, 1924, ch. 233, 43 Stat. 253.

[248] Wilcomb E. Washburn, comp., *The American Indian and the United States*, vol. 2, excerpts from reports of John Collier, Commissioner of Indian Affairs, vol. 2 (New York: Random House, 1973), pp. 918–19, 926–27, 944–45, 951.

[249] 25 U.S.C. §452–57.

[250] H. Con. Res. 108, 83d Cong., 1st sess., 67 Stat. 13132 (1953).

[251] Pub. L. No. 83–280, 18 U.S.C. §1162 and 28 U.S.C. §1360 (1976).

[252] President Nixon's July 8, 1970, Message to the Congress, Recommendations for Indian Policy, H. Doc. No. 91–363, 91st Cong., 2d sess.; Indian Self-Determination and Education Assistance Act, Pub. L. No. 93–638, 88 Stat. 2203 (1975).

[253] Indian Civil Rights Act, 25 U.S.C. §§1321–1322 (1976).

[254] E.g., Arizona v. California, 373 U.S. 546 (1963), involving the rights of these and other States as well as tribes to the water in the Colorado River system.

[255] Conflicting authority of State and Federal governments to license projects affecting waterways has resulted in disputes involving private interests claiming rights through State or Federal licenses. E.g., United States v. Appalachian Power Co., 311 U.S. 377 (1940).

control over the actions of individuals under certain circumstances.[256]

Tribal governments experience similar conflicts with State and local governments as well as with the Federal Government over what rights each has with respect to the others. Tribal efforts have been directed toward retaining political and economic control over their people, territories, and resources against the ever-growing pressure of non-Indian civilization. In recent years, tribes have been trying to regain respect for their governmental authority and recognition of rights that have been ignored or rendered less viable through the actions of non-Indian governments. The following pages provide a brief look at some of the important issues over which tribes and States have experienced conflict.

Hunting and Fishing

When the Federal Government entered into treaties with Indian tribes, land acquisition by the United States was a central element of the bargain. Tribes traded away vast amounts of territory while retaining land bases of varying size for themselves. When tribes controlled the land, they sustained themselves from its bounty. Some tribes were agricultural, but many hunted and fished both for sustenance and for commercial purposes. The diminished land base that resulted from treaties created a dilemma for those tribes who relied on hunting and fishing for subsistence. The land they reserved for themselves often did not cover the areas they needed to assure their survival. The problem was addressed in many treaties by specifically recognizing Indian hunting and fishing rights.[257] The following are some examples of these provisions:

> . . . .the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase.[258]

> The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.[259]

> The stipulations contained in the Treaty of Greenville, relative to the right of the Indians to hunt upon the land hereby ceded, while it continues the property of the United States, shall apply to this treaty; and the Indians shall, for the same term, enjoy the privilege of making sugar upon the same land, committing no unnecessary waste upon the trees.[260]

Courts have also determined that tribes may retain hunting and fishing rights in lands ceded to the United States in cases where no mention of such rights is made in a treaty.[261] Despite these assurances, States enacted their own hunting and fishing regulations and attempted to apply them to tribes. Battles in and out of Federal and State courts have produced varying results.

Early litigation in this area reached the United States Supreme Court in 1896 as Wyoming applied its own game laws to Indian hunting.[262] The Indians involved contended that the treaty with the Shoshone-Bannock Tribes[263] protected the rights of tribal members to hunt "unoccupied lands."[264] Although the lower Federal court agreed with the tribal view, the United States Supreme Court reversed the decision, determining that the term "unoccupied lands" contemplated a temporary right which would expire as land became occupied. It then looked to the State's argument, which pointed out that the legislation creating the State of Wyoming had admitted that State to the Union on an "equal footing" with the original 13 States and that the regulatory authority over hunting which those States possessed was not subordinated to any Indian right. The Supreme Court agreed with Wyoming's

[256] E.g., the Federal Government has preempted the power of States to enact patent laws that conflict with Federal patent statutes, e.g., Sears Roebuck and Co. v. Stiffel Co., 376 U.S. 225 (1964).
[257] See chapter 3 for a discussion of northwest treaty fishing provisions.
[258] Treaty with the Sioux Indians, Apr. 29, 1868, 15 Stat. 635, 639.
[259] Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957.
[260] Treaty with Wyandot, Sept. 29, 1817, 7 Stat. 160.
[261] E.g., Menominee Tribe of Indians v. United States, 379 Ct. Cl. 496, 388 F.2d 998 (1967), *aff'd.* 391 U.S. 404 (1968).
[262] Ward v. Race Horse, 163 U.S. 504 (1896).
[263] 15 Stat. 675 (1868).
[264] The full provision reads: "The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts." 15 Stat. at 674–75.

conclusion that its regulatory rights should not be so limited.[265]

Technically, this case has never been overruled, but its precedential value has been virtually eliminated by subsequent decisions that have looked in depth at the circumstances existing at treaty times, including whether the Indians involved could even converse in English, let alone make fine distinctions in the language. Although other States were also admitted to the Union on an "equal footing," this general language has not been construed as an abrogation of treaty guarantees to hunt and fish in subsequent decisions of the Court.[266]

The way that many of these cases get to court is either in the form of a challenge to a regulatory scheme imposed by a State government or as a criminal matter. In the latter case, typically, a tribal member asserting rights to hunt or fish is confronted by a game officer who arrests him or her for violating State law. The case then proceeds through the State criminal process with the treaty provision being used as a defense to the prosecution.

Courts in Washington State have set precedents establishing a State right to regulate off-reservation Indian fishing despite conflicting treaty provisions.[267] Although that State has consistently enacted and applied its laws without respect to treaty provisions until directed to do so by Federal courts, other State court systems have held that treaty provisions do limit the application of State game laws. As examples, in three States, criminal prosecutions have reached State appellate courts that have recognized treaty rights as being above the State regulations. A Michigan decision held that treaty Indians could not be required to purchase State fishing licenses, since their fishing rights were attributable to a Federal, not a State, source.[268] In Idaho, a Nez Perce Indian was found not to be criminally liable for killing a deer out of a State season because of his right to hunt upon "open and unclaimed land," as guaranteed by treaty.[269] A Wisconsin decision held that Chippewas have the right to fish in Lake Superior subject to State regulation only to the extent necessary to prevent substantial depletion of the resource.[270]

In other cases arising in other States, there has been respectful treatment of Indian hunting and fishing rights, but even where this occurs, Indians must go to the trouble and expense of defending themselves in a criminal setting. Once a case is litigated, there is no guarantee that at a later date the State might not again apply its laws to a case with a slightly different fact pattern, forcing the tribe or an Indian to defend again.[271]

An example of how change in Federal Indian policy bears on State court litigation can be found in the termination of the Menominee Reservation. During the termination era of the 1950s, the Menominees of Wisconsin were included among the tribes whose Federal trust relationship was to be terminated. Shortly after termination, the State sought to enforce its game laws against a tribal member for hunting deer on the former reservation in violation of State law. A State appellate court permitted prosecution on the theory that termination of the Federal trust relationship with the Menominees terminated their hunting and fishing rights and subjected them to State regulation.[272]

A later Federal court ruling, however, established that the Menominees retained rights to hunt and fish because those rights were not specifically terminated when the tribal-Federal relationshp was ended, and, as a result, the State was prevented from applying its game laws on the former reservation.[273]

This case provides an interesting example of role shifts among the governments involved. The case, heard in the United States Supreme Court, was on appeal from a decision of the United States Court of Claims in which the Menominees sought compensation from the United States for terminating the tribe's fishing rights. The United States defended itself in the case and won, based on a decision which said that terminating the tribal-Federal relationships did not automatically terminate fishing rights.[274] The United States won the case, but the tribe was the real winner because its right to fish was held to survive termination. This placed the United States and the Menominees on the same side of the issue in the U.S. Supreme Court, requiring the Court to request that

[265] 163 U.S. 514–15.
[266] United States v. Winans, 198 U.S. 371 (1905).
[267] State v. Alexis, 154 P. 805 (1916); State v. Towessenute, 154 P. 180 (1916). Washington State fishing litigation is discussed in detail in chapter 3.
[268] People v. Jondreau, 384 Mich. 539, 185 N.W. 2d 375 (1971).
[269] State v. Arthur, 261 P.2d 135 (1953).
[270] State v. Gurnoe, 53 Wis. 2d 390, 192 N.W. 2d 892 (1972).
[271] *See*, e.g., State v. Tinno, 94 Idaho 759, 497 P.2d 1386 (Idaho 1972); People v. Le Blanc, 399 Mich. 31, 248 N.W. 2d 199 (1976); "Indian Law Treaty Fishing Rights—The Michigan Position," *Wayne Law Review*, p. 1187 (1978); see discussion of Washington cases, chapter 3.
[272] State v. Sanapaw, 21 Wis. 2d 377, 124 N.W. 2d 41 (1963), *cert. denied*, 377 U.S. 991 (1964).
[273] Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).
[274] Menominee Tribe of Indians v. United States, 179 Ct. Cl. 496, 588 F.2d 998 (1967).

the State participate as a party in order to have its adverse interest represented.

Though this particular shifting of litigation positions may be unique to the facts of the Menominee case, it is indicative of legal developments in Indian matters throughout history. Depending on the situation, the timing, the persons involved, and other factors, tribes, States, and the Federal Government can be found on the same side or on opposing sides of any battle. While the United States is representing the interests of a tribe as its trustee, it may also be a defendant in a case before the court of claims, or formerly, before the Indian Claims Commission on another matter. Also, States may be locked in a struggle over some aspects of interrelationship with a tribal government, while at the same time operating a cooperative effort in another area of contact.

Taxation

"[T]he power to tax involves the power to destroy."[275] So it is in Indian country as well as elsewhere in the world. There has been much conflict throughout the years over taxing power, and States have expressed great concern over the relative taxing authority possessed by them and the tribes within their boundaries.

In an early case, which reached the United States Supreme Court, a South Dakota county attempted to impose a personal property tax upon livestock, wagons, and improvements made on Indian trust land within the Lake Traverse Reservation, home of the Sisseton Wahpeton Sioux. The Supreme Court in this case held that the county had no right to impose such a tax as long as the land containing the personal property was Indian trust land.[276]

In Oklahoma, the State imposed its inheritance tax on tribal members. The issue came before the United States Supreme Court in 1926[277] and again in the 1940s. In the later case, the Court decided that the State could impose its inheritance tax scheme on tribal members, but rested its decision on the peculiar situation of the Oklahoma tribes involved, who were considered to be without tribal sovereignty and therefore without immunity from State taxation.[278]

In the 1970s, the United States Supreme Court issued rulings on several taxation situations that have been issues of jurisdictional conflict between Indian and non-Indian governments. The Arizona court system upheld the application of State income tax law to cover earnings of Navajo tribal members from on-reservation sources. In *McClanahan v. Arizona State Tax Commission,* the United States Supreme Court unanimously held that income of a tribal member residing on reservation, earned on reservation was beyond the taxing power of the State.[279]

The case followed from an earlier U.S. Supreme Court case arising on the Navajo Reservation (*Williams v. Lee)* in which the State allowed a non-Indian to use its court system to collect a debt incurred by a Navajo on the reservation. The U.S. Supreme Court held that the tribal court was the appropriate forum for the case, because allowing such cases to be brought in State courts would interfere with tribal self-government.[280] The Arizona court tried to distinguish the income tax case from the earlier case by noting that an income tax is personal and therefore would not interfere with tribal self-government. The *McClanahan* case made it clear that Arizona had no more jurisdiction to tax income derived from reservation land than it had to tax the value of the land itself.[281] In fact, the U.S. Supreme Court expressed the view that by 1973 that principle should have been clear, because in the years between the *Williams* decision and the *McClanahan* case the Supreme Court had invalidated another attempt by Arizona to impose an income tax on money earned on the Navajo Reservation.[282]

In another important case, the United States Supreme Court put to rest the theory that Public Law 280,[283] which gave some States criminal and civil jurisdiction over Indian tribes, also gave States the power to impose taxes on the tribes. A Minnesota county tried to impose a personal property tax on personal property located on Indian trust land, relying on Public Law 280 as the source of its authority to do so. The Supreme Court struck down this tax effort, holding that Public Law 280 could

[275] McCulloch v. Maryland, 4 Wheat 316, 429 (1819).
[276] United States v. Rickert, 188 U.S. 432 (1903).
[277] Childers v. Beaver, 270 U.S. 555 (1926).
[278] Oklahoma Tax Commission v. United States, 319 U.S. 598 (1943).
[279] McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973).
[280] Williams v. Lee, 358 U.S. 217 (1959).
[281] 411 U.S. at 181.
[282] *Id.* at 180–81. In Warren Trading Post v. Tax Commission, 380 U.S. 685 (1965), the State tried to tax a trading post for income earned on reservation.
[283] See discussion of Public Law 280 in chapter 5.

not be read as authorizing the States and their local subdivisions to impose such taxes.[284]

Another issue of confrontation between State and tribal taxation has been over cigarette taxes. Several interests are involved in this. The nature of the commodity being taxed is that it is both easily movable and quickly consumed. There is a motivation among consumers to cut the tax rate whenever and to the extent possible. Some tribes have utilized this opportunity, operating smokeshops both for their own people and for the revenue produced from non-Indians seeking cheaper tobacco. States have tried to prevent tribes from providing an alternative tobacco source to State residents by requiring tribes to collect State taxes on cigarettes they sell. Many tribes have refused to recognize any authority in the States to require such tax collection on tribal trust land, and cases have been litigated to determine the issue. Recently, the U.S. Supreme Court heard a case in which the State of Montana attempted to impose its cigarette tax requirements on Indian smokeshops. The Court decided that the smokeshops involved had no responsibility to charge tribal members a tax on cigarettes but the State could require tribes to collect the tax from non-Indians. The Court reasoned that this type of sales tax was either paid or not paid by the consumer rather than the smokeshop, and so merely requiring the tribes to collect it was not an undue burden on tribal self-government.[285]

In *Washington v. Confederate Tribes of the Colville Reservation,* [286] the Supreme Court refused to recognize a distinction drawn by lower Federal courts when tribes were imposing their own taxes on cigarettes. The Court held that no principle of law permitted the tribes to market an exemption from State tax to persons who would normally make their purchases elsewhere. In addition, the Court decided that the States' refusal to give credit on the amount of tribal taxes paid did not infringe on the right of tribal self-government.

The cases involving governmental authority to tax have not all revolved around the issue of States taxing tribes. There have been conflicts in some cases of tribes imposing taxes on individuals or State government entities. The Navajo Tribe imposed a tax on the city of Los Angeles and the Salt River Project Agricultural Improvement and Power District on their possessory interest in land leased by them from the tribe. A Federal court upheld this exercise of taxing authority, finding that the project involved the function of power generation, which was not a necessary government function, but one often handled by private companies. This placed the governments involved in a position similar to private companies for taxing purposes and rendered inappropriate their claims of intergovernmental tax immunity.[287]

The Navajo tax case may be just the beginning of cases involving tribes exercising taxing authority over property located on reservations or income derived from reservation businesses. Tribal autonomy may depend on tribal ability to raise the revenue necessary to function, and it is likely that taxation will be an important source for many tribes.

Resources

Control over natural resources may be the next protracted battleground for tribes, States, the Federal Government, and private interests. Over a century ago, the demand for land gave major impetus to the westward push of non-Indian civilization, and the quest for gold overcame whatever obstacle stood in the way of eager prospectors.[288] Today the demand for water and the quest for new energy resources could prove as devastating to tribes as the resource conflicts of the 19th century. Such economic demands might also be the basis for economic independence for tribes that have significant resources located on their reservations.[289]

Water rights is a major area of conflict between tribal, State, and Federal governments in the water-poor western United States. In the West, the right to use water in the future is recognized in those who have made beneficial use of water in the past. Now known as the doctrine of prior appropriation, it has been defined in these terms:

> To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the state where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually

[284] Bryan v. Itasca County, 426 U.S. 373 (1976).
[285] Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976).
[286] 48 U.S.L.W. 4668 (1980).
[287] Salt River Project Agricultural Improvement and Power District v. Navajo Tribe of Indians, Civ. No. 78-352 (D. Ariz. 1978).

[288] *Final Report,* pp. 55-56.
[289] Tribal timber reserves, excluding Alaska, are estimated at 40 billion board feet, ibid., p. 324; Indian oil and gas reserves are estimated at 3 percent of the national total, and 7 to 13 percent of the Nation's coal is on Indian land, ibid., pp. 338-39.

> forever, subject only to the right of prior appropriations.[290]

The fact that so many settlers were establishing homes and communities near Indian reservations raised the issue of whether the lands of the tribes were subject to the doctrine of prior appropriation. This issue was brought before the U.S. Supreme Court in a case involving the Fort Belknap Indian Reservation in Montana.[291] An agreement between the Indians of several tribes and the United States[292] that established the reservation did not mention what, if any, water rights were reserved by the Indians. Yet the land retained by the Indians was arid and valueless for agricultural purposes without irrigation. Shortly after the reservation was established, non-Indians diverted the waters of a river that formed the northern boundary of the reservation.

The non-Indians claimed a right to the water based on the theory of prior appropriation.[293] The Court, however, looked to the circumstances surrounding the creation of the reservation, noting that the tribe had relinquished the large land areas necessary to support its nomadic lifestyle and reserved land which, if irrigated, would sustain the tribe through agriculture. The Court refused to accept the non-Indian claims to the water, finding instead that the creation of the reservation implied a right to an amount of water sufficient to support the purposes of the reservation, which in this case meant to irrigate the land.[294] This right was deemed to be superior to any contrary State water rights laws.[295] The right was also viewed as established by the Federal Government for the benefit of the Indians, and not affected or implicitly repealed by Montana's admission into the Union, as argued by counsel for the State. The "*Winters* rights doctrine" established in this case formed the basis for later litigation in which Indian tribes and non-Indian governments and individuals fought and are still fighting over scarce water supplies.

Litigation over water rights tends to be complex, with a vast number of parties whose land borders the subject water systems having to be brought into the case through formal pleadings and service of process. Such litigation is by no means confined to opposing interests of a State and a tribe. In many cases, States oppose one another, and in larger river systems several governmental entities may be involved. A major case of this nature, decided by the United States Supreme Court, is *Arizona v. California.* [296] That case involved the relative water rights of five tribes and four States bordering the Colorado River system. With respect to the tribes involved, the Court upheld the *Winters* doctrine, stating that the tribes had a right superior to that of the States involved to an amount of water sufficient to irrigate all irrigable portions of their reservations. As noted by the American Indian Policy Review Commission:

> The as-yet undeveloped *Winters* Doctrine Rights of the tribes are quite substantial in extent and in their potential adverse impact upon non-Indian economies built on water use permits issued pursuant to state law "subject to their existing rights."[297]

The manner in which those rights will be determined, however, may result in minimal amounts of water being recognized as the right of tribes. In 1952 the McCarran Water Rights Suit Act, commonly known as the McCarran Act,[298] was passed. Through this legislation, the United States consented to be sued in State court in litigation involving water rights owned by the United States.

A major test of the McCarran Act occurred in Colorado in 1971 when the U.S. Department of Justice argued before the Colorado Supreme Court that the McCarran Act did not apply to water rights concerning land withdrawn from the public domain, in that case, a national forest. In the ligitation, however, there was no distinction made between forest land owned outright by the United States and land owned by the United States as trustee for Indian tribes. Thus, the State court ruled that the McCarran Act applied to "whatever rights the United States had to water."[299] The Supreme Court of the United States upheld the decision of the Colorado court in a decision known as the *Eagle River* case, which also did not distinguish between Federal water rights owned by and for the Federal

[290] Arizona v. California, 283 U.S. 423 (1931).
[291] Winters v. United States, 207 U.S. 564 (1908).
[292] Act of May 1, 1888, ch. 213, 25 Stat. 113.
[293] 207 U.S. at 572.
[294] *Id.* at 564.
[295] *Id.* at 577.
[296] 371 U.S. 340 (1963).
[297] *Task Force Four Report*, p. 160.
[298] 43 U.S.C. §666 (1976).
[299] United States v. The District Court, 164 Col. 555, 458 P.2d 760, 773 (1969).

Government and those owned by the Federal Government in trust for Indian tribes.[300]

The presentation of the case by the Solicitor General of the United States to the United States Supreme Court engendered acrimony among the tribes, who had urged the Federal Government to distinguish between the two types of title it held.[301] The tribes pointed out that by failing to distinguish between these varying types of Federal water rights, the precedent established in the case would be applied to Indian cases as well, forcing the tribes to adjudicate their water rights before historically unfavorable State tribunals.

In 1976 Indian fears were realized as the United States Supreme Court applied the principle of the *Eagle River* case to a case directly involving Indian water rights.[302] The Supreme Court chose to follow the precedent established in *Eagle River* without distinguishing between the purely Federal water rights, which were the subject of that case, and the Indian rights owned by the United States as trustee for tribes. As a result, the complexion of water rights disputes has changed somewhat to the disadvantage of tribes who, under present law, now know that the final arbiter of their water rights in disputes that reach a litigative level can often be State court systems.

Many current disputes over water date back to the policies of the United States regarding settlement of the country by non-Indians. As stated by the American Indian Policy Review Commission:

> It was the policy of the U.S. Government to encourage settlement of its lands and to create family-sized farms with little or no regard to Indian rights to the use of water. With the encouragement, or at least the cooperation, of the Secretary of the Interior, the principal agent of the trustee United States charged with protecting Indian rights and natural resources, many large irrigation projects were constructed on streams that flowed through or bordered Indian reservations. With few exceptions, these projects were planned and built by the Federal Government without any attempt to define, let alone protect, the prior and paramount rights of the Indians.[303]

The state of the Nation's water resources has been recognized as a national priority. On June 6, 1978, President Carter delivered a water policy message to the Congress containing initiatives designed to:

- Improve planning and efficient management of Federal water resource programs to prevent waste and to permit necessary water projects that are cost effective, safe, and environmentally sound to move forward expeditiously.
- Provide a new, national emphasis on water conservation.
- Enhance Federal-State cooperation and improve State water resources planning.
- Increase attention to environmental quality.[304]

Included in the message was an instruction to Federal agencies to "inventory and quantify Federal reserved and Indian water rights."[305] Following a Presidential directive of July 12, 1978, a Task Force on Indian Reserve Water Rights was created. Its members were designees of the Departments of the Interior, Agriculture, Housing and Urban Development, Army, Justice, and the Tennessee Valley Authority.[306] This task force was one of 19 formed to deal with water policy implementation.[307] The task force was required to "establish procedures to be used in evaluating projects for the development of Indian water resources and to increase Indian water development in conjunction with quantification of rights."[308]

This Federal policy of quantifying Indian water rights along with the establishment of procedures for the development of Indian water resources will undoubtedly affect tribal-State conflicts over water rights. States have expressed concern that they cannot develop water resources where tribes have prior and paramount rights in uncertain amounts. Tribes have expressed fear that the present quantification of their rights, particularly on undeveloped reservations, may result in a determination of a right to a quantity of water insufficient to meet future needs. The pursuit of a Federal objective to quantify

[300] United States v. District Court of Eagle County, 401 U.S. 520 (1971).
[301] Mel Tonasket, president of the National Congress of American Indians, statement to the American Indian Policy Review Commission, *Task Force Four Report*, pp. 166–71.
[302] Akin v. United States, 424 U.S. 800 (1976).
[303] *Task Force Four Report*, pp. 165–66.
[304] President Jimmy Carter, Federal Water Policy Message to the Congress, 14 *Weekly Comp. of Pres. Doc.* 1044 (June 6, 1978).
[305] Ibid., p. 1050.
[306] President Jimmy Carter, to the Secretaries of the Interior, Agriculture, Housing and Urban Development, Army, the Attorney General, and the Chairman of the Tennessee Valley Authority (July 12, 1978) (hereafter cited as President's Directive).
[307] U.S., Department of the Interior, Water Policy Implementation-Coordination Group, chart entitled "Water Policy Implementation Task Forces—Lead Agencies—Lead Individuals" (Oct. 24, 1978).
[308] President's Directive, p. 3.

Indian water rights may thus be expected to result in action between States and tribes either to agree on their respective water rights or to litigate them perhaps sooner than they might have.

Another major issue confronting the Task Force on Indian Water Rights is that its procedures for evaluating Indian water development projects are to be consistent with those being developed by the Water Resources Council. Presidential direction for establishing selection criteria "placed heavy emphasis on strict economic feasibility and emphasized environmental protection."[309] The task force noted that this provision, if applied to Indian water projects, "could exacerbate an already bad situation on Indian reservations."[310] Noting that the current two planning objectives, national economic development and environmental quality, "do not recognize some benefits that are generated by water development projects on Indian reservations,"[311] the task force recommended a new planning objective to be applied to Indian projects, a "Permanent Tribal Homeland."[312]

Choices to be made by Federal officials in supporting Indian water development and quantifying Indian water rights can play a central role in water rights conflicts between States and tribes. Just as previous Federal policies such as homesteading, land allotment, and tribal self-determination have had a direct effect on how Indians and non-Indians approach one another, a national water policy can be a vehicle for calming or inflaming Indian and non-Indian differences over water rights.

The Nonlitigative Setting

The preceding summary of conflict litigation focuses only on issues and specific cases in which the parties involved chose to force a determination of their rights through the judicial system. This is, however, a very limited view of interactions between tribes and State and local governments. Many intergovernmental contacts do not occur between lawyers representing litigants in courts. For the most part, Indian tribes and non-Indian governments must deal with one another directly to address ongoing problems of operating their respective governments.

The relationships between tribal, State, and local governments, the frequency with which they have contact, the issues over which they have conflict, and those on which they act cooperatively are as varied as the governments, the geographical areas, and the populations involved.

State governments have been central in the determination or redetermination of Indian rights and have played a variety of roles in disputes that have ranged from the passage of legislation to administrative regulation to judicial determination of disputed matters. Historical racist attitudes[313] characterizing Indians as "inferior" beings or "uncivilized" or "savage" have been used to support State assumptions of political authority over Indians and tribes. Sometimes the exercise of assumed State authority has touched off a dispute. Examples of this may be found in attempts of States to assert taxing authority over tribal members, governments, and property.[314] The hunting and fishing cases discussed earlier provide further examples of States trying to impose their authority on tribes, with the ultimate result being confrontation or litigation or both.[315]

In some instances, States have used their authority and power to prevent differences of opinion about legal rights from becoming confrontations or the basis for lawsuits. In South Dakota, for example, a task force on State-Indian relations was created to address differences between the State and the tribes. As Wayne Ducheneaux, tribal chairman of the Cheyenne River Sioux, described it:

> There were nine legislators and nine tribal chairmen on the task force. We sat down and met on a one-to-one basis and the task force was authorized to introduce legislation into the State legislature that they felt would help the State Indian relations. And out of the nine proposed bills, seven of them passed.[316]

One of those bills was an authorization for the State to enter into cooperative taxing agreements with tribes. Through this legislation, the State agreed not to try to assert sales, use, or cigarette taxing authority on reservations. The legislation further provided authority for the State executive to agree with each of the nine tribes desiring such an

[309] Water Policy Implementation Interagency Task Force, *Draft Report on Planning Procedures for Indian Water Resources Development* (Department of the Interior, June 1979), p. 8.
[310] Ibid.
[311] Ibid., p. 9.
[312] Ibid., p. 10.
[313] See previous section, "Traditional Civil Rights Problems."
[314] See discussion of litigation over taxing authority earlier in this section.
[315] See discussion of litigation in hunting and fishing rights cases earlier in this section; for a description of the role played by Washington State fishing regulatory agencies, see chapter 3.
[316] *Hearing Before the U.S. Commission on Civil Rights, Rapid City, South Dakota*, July 27-28, 1978, p. 243 (hereafter cited as *South Dakota Hearing*).

arrangement to use the State tax collection machinery to collect taxes imposed by the tribes in return for an administrative fee.[317]

An essential aspect of this legislation is that it treats tribes as individual governments. Indeed, it did not attempt to create a taxing scheme applicable to every reservation in the State, but only on those that desire the arrangement. This approach was reflected in the remarks of Attorney General (now Governor) William Janklow, "All tribes aren't the same. . .you have got to treat them like different countries or States. You can't lump all the tribes into a package."[318]

State judicial systems have sometimes been at the center of disputes in which there are conflicting claims about the authority of the judiciary to decide a matter. Water rights litigation is a prime example of an area where the court in which relative rights are determined is viewed as a crucial factor.[319] The Washington State fishing rights litigation also demonstrates how the court system itself can become an issue. Over the course of that litigation, the State supreme court has consistently upheld the regulatory authority of State agencies over tribal treaty rights. Parallel litigation in the Federal system has ruled that the fishing tribes possess separate treaty rights that are superior to the State's general authority to regulate fisheries, except for the exercise of resource conservation authority, and in several of these cases, the obstinancy of the State judiciary has been noted.[320]

Another aspect of any State's position in a dispute between Indians and non-Indians is the desire of States to expand their own control and power. Tribes, though generally located within single States (some reservations cross State lines), are governments whose rights are traceable to a status of sovereignty recognized by the Federal Government. Unlike counties or cities, their authority exists independently of State governments. It is not surprising that State governments have traditionally viewed themselves as representing non-Indian interests within the State. Disputes between individual non-Indians and tribal governments will often contain another level of conflict between State and tribal governments. Resistance by individual non-Indians to the assertion of tribal judicial authority over them is most naturally joined in by the State government, which will be the governmental authority likely to fill the void in criminal law enforcement created by a court ruling denying to tribes criminal jurisdiction over non-Indians.

Similarly, a dispute over land ownership between non-Indians and a tribe that results in loss of Indian control over land places that land under State authority to regulate its use and to tax it. Naturally, the State, interested in increasing its tax base along with its general control, would tend to support the non-Indian position. Given the overwhelmingly non-Indian composition of State governments and the direct benefits to the State from non-Indian victories over tribal claims to rights, resources, and authority, the constant pressure of States for reduction in tribal rights and authority must be considered a factor in Indian and non-Indian disputes.

Local Conditions

Counties and cities legally are subdivisions of State government.[321] The relationship of these governments to tribes varies as widely as the circumstances that exist between them. In some cases, for example, an Indian reservation exists in one corner of a rural county.[322] In others, a reservation may be larger than the adjacent, non-Indian units of government.[323]

Local government functions typically include law enforcement, fire protection, water and waste management, land management, tax collection, and civil and criminal court operations with associated recordkeeping. In Washington State, the Yakima Indian Nation and Yakima County have experienced cooperative efforts concerning zoning, land use, solid waste management, and law enforcement.[324] With the non-Indian city of Toppenish, located on the border of the Yakima Reservation, the relationship between Indians and non-Indians had not been good. As the mayor of Toppenish saw it, there was poor communication between tribal and city govern-

[317] S.D. Comp. Laws Ann. Ch. 10-12A (Supp. 1979).
[318] *South Dakota Hearing*, p. 222.
[319] See discussion of the McCarran Act earlier in this section.
[320] See chapter 3 on Washington State fishing rights dispute.
[321] Rogers Locomotive Works v. Emigrant Company, 164 U.S. 559 (1896).
[322] E.g., the Hoh Reservation occupies only 443 acres on the western edge of Jefferson County in western Washington. U.S. Department of Commerce, *Federal and State Indian Reservation and Indian Trust Areas* (1974), p. 535.
[323] The Navajo Reservation covers 13,989,222 acres, including entire counties of Arizona and portions of counties in Arizona, Utah, and New Mexico, ibid., p. 63.
[324] Roger Jim, testimony, *Hearing Before the U.S. Commission on Civil Rights*, Seattle, Washington, Oct. 19-20, 1977, p. 53 (hereafter cited as *Seattle Hearing*, vol. I).

ment that could be traced to "hard feelings" associated with poor treatment of Indians in the city.[325] In the early 1970s, when the city chose to construct a sewage treatment system, the tribe expressed no interest in the project. By 1977, however, communication had improved sufficiently for the tribe to involve itself with the project in lieu of building a separate facility of its own. The two governments entered into a cooperative agreement by which costs of providing a necessary service were reduced for both.[326]

The situation existing elsewhere in Washington State, for example between Whatcom County and the Lummi Tribe, was very different. In response to the Lummi attempt to construct a sewer system, a separate, non-Indian sewer district was formed. The tribe saw the creation of the non-Indian sewer district as one attempt among many by local non-Indians to prevent tribal development:

> when we announced our project, some of the people. . .took up arms and tried to stop that. They just worked for several years to slow down the Lummi progress. It cost us hundreds and thousands of dollars to fight off the brushfires that they create. . .like we're trying to develop a sewer system, that is the cause for the formation of Whatcom Sewer District Number 2. We laid claim to our water rights on the reservation, so immediately we have a Water District Number 15.[327]

The non-Indians of Whatcom County saw their actions quite differently.

> We have endeavored to cooperate in every way possible. The very fact that the Lummi Tribe absolutely refuses to recognize Whatcom County Sewer District Number 2, in our opinion, there is just no way, [to create a mutually useful sewer system] because if we're not recognized, how can we even begin to cooperate?[328]

In any event, it is clear that in this case the Indian and non-Indian communities were at odds, and neither trusted the other with the control of a sewer system. The dispute over sewer system authority also interfered with tribal attempts to obtain Federal funding for the project.[329]

Many working arrangements between tribal and local governments can be found throughout Indian country. Cooperative law enforcement arrangements that include such elements as cross-deputization of tribal and local officers, sharing of radio frequencies, and supportive patrolling arrangements exist, among other places, between the Yakima County Police and Yakima Tribal Police,[330] between the Grays Harbor County Police and Quinault Tribal Police,[331] and between the Colville Tribal Police and the city of Nespelem. In fact, in the case of the Colvilles, the city of Nespelem contracted with the tribe for the provision of law enforcement services to the city.[332] Elsewhere in Washington State, counties and tribes do not participate in cross-deputization agreements.[333]

In addition to law enforcement agreements, Grays Harbor County and the Quinault Indian Nation have worked out cooperative arrangements in the areas of solid waste disposal, ambulance services, easement for road construction, and juvenile services.[334]

On the reservations of South Dakota, the level of cooperative efforts to enforce the law varies from locality to locality. Even within an area, a tribe may have a different working relationship with one overlapping county than it has with other adjacent counties. The officers of the Crow Creek Reservation are cross-deputized with officers of Buffalo County, for example, but not with other adjacent counties.[335] The Sisseton Wahpeton Tribal Police are cross-deputized with Marshall County officers,[336] but not with those of Roberts County.[337]

Agreements have been reached between the Cheyenne River Sioux Tribe and the South Dakota Game, Fish, and Parks Department for joint enforcement efforts,[338] and between the Crow Creek Sioux Tribe and that same State department with respect to hunting rights and game law enforcement

[325] Fred Mutch, testimony, ibid., p. 57.
[326] Mutch Testimony and Roger Jim Testimony, ibid., pp. 56–58.
[327] Sam Cagey, Lummi tribal chairman, testimony, ibid., p. 127.
[328] Betty Nesbit, commissioner, Whatcom County Sewer District Number 2, testimony, ibid., pp. 101–02.
[329] Documentary History of the Lummi Sewer Project, *Seattle Hearing*, vol. II, exhibit 14, pp. 174–81.
[330] *Seattle Hearing*, vol. I, pp. 72–73.
[331] Ibid., pp. 207–08.
[332] U.S., Congress, Senate, Senate Select Committee on Indian Affairs, *Hearing on S. 2502*, 95th Cong., 2d sess., 1978, p. 230.
[333] E.g., the Suquamish Tribe and Kitsap County, where the *Oliphant* case originated, do not have such an agreement. *Seattle Hearing*, vol. I, p. 161.
[334] Roland Youmans, commissioner, Grays Harbor County, testimony, *Seattle Hearing*, vol. I, p. 209.
[335] William Shields, Jr., captain, Crow Creek tribal police, testimony, *South Dakota Hearing*, p. 69.
[336] Ralph Olauson, sheriff, Marshall County, South Dakota, testimony, ibid., p. 19.
[337] Neil Long, sheriff, Roberts County, South Dakota, testimony, ibid., p. 20.
[338] Wayne Ducheneaux, chairman, Cheyenne River Sioux Tribe, testimony, ibid., p. 238.

on a parcel of State land located within the reservation boundary.[339]

Some cooperative efforts between Indian and non-Indian governments may be traced to Federal statutory law. This is particularly true among statutes establishing Federal domestic assistance programs, which vary in their approach to tribal governments. Some programs set money aside specifically for use by tribal governments.[340] Other programs provide money for tribes through a combination of set-aside funds and funds directed to State governments for which tribes may compete as if they were local governments within the State.[341] Still other programs require tribes to go through State funding processes in order to participate in federally funded programs at all.[342]

State governments hold a powerful position over tribes with respect to Federal funds they control. Under the Title XX programs, for example, States develop plans that determine the types of services to be offered, and States control the distribution of funds made available by the Federal Government. There is no guarantee that tribes will receive a fair share of funds or services based on their needs or based on their populations, although they are by law entitled to share.[343] Even if they receive services to which they are entitled, tribes are then placed in the position of being indebted to the State for their inclusion in the service delivery system.[344] Even where States wish to include tribes in the services offered, their delivery systems are often not equipped to provide them because of cultural differences or distances between reservations and State social service offices.[345] Another problem with passing funds through State agencies on their way to tribes is the fact that State standards will be applied to Indian tribes. As Goldie Denney, Quinault tribal social services director, said about State-imposed child care requirements under the Title XX program:

> The standards are based upon materialistic things such as the number of rooms in the home, how the rooms are decorated, just requirements that all related to material things in a child's life. Emotional well-being of a child is much more important than material things that surround that child. . . .This type of thing, you know, is not in the State standards. . . .So, if you contract with the State to provide these types of services, then you're going to have to be in compliance with State standards. The Federal regulations have stipulated in the area of foster care, licensing on Indian reservations, day care standards that the States must work with Indian tribes and organizations. If they're not able to meet the standards that the State sets up, then they're to help the Indian people and work toward making those standards lenient enough so that they do meet the standards on Indian reservations, but no attempts have been made by the State to do anything about this.[346]

There is also some question whether States are providing services to tribes.

Conflicting testimony was received in Washington State on this point from the deputy director of the State social and health services department and a tribal social services director. In response to the statement that tribes, on the basis of their relative population, were getting more than their fair share of Title XX funds based on number but less than their fair share based on need,[347] the tribal social services director offered this observation:

> Mr. Thomas' statement that Indian people are getting their share of the Title XX services is probably due to the fact that casework staff are in contact with us in cases of adoption, foster care, and child protective services, so we go out and provide the services.
>
> They contact us primarily by telephone, and we do the work. We document it, send the material, the case summaries, and this sort of thing, into the local department of social and health services, and then they put it in their case record, and so it goes in their printouts every month that they have provided so many cases—Indian child protective services cases, so many foster care cases, so many adoptions, etc.

[339] Lease Agreement Between Crow Creek Sioux Tribe and State of South Dakota, Mar. 1, 1978 (Commission files).

[340] E.g., the Comprehensive Employment and Training Act of 1973 under Title III allows tribes to receive money directly from the Federal Government for the operation of tribal programs. 29 U.S.C. 872 (1976).

[341] E.g., the Law Enforcement Assistance Act, 42 U.S.C. 3731 (1976).

[342] E.g., Title XX of the Social Security Act, 42 U.S.C. 1397 (1976).

[343] See Morton v. Ruiz, 415 U.S. 199 (1974).

[344] The following programs were listed by the director of the Michigan Commission on Indian Affairs as not requiring the State to include Indian tribes: Title XX—Social Security Administration; Law Enforcement Assistance Administration; HUD—701 planning grants; Intergovernmental Personnel Act; vocational education programs; State-operated scholarship programs; Rural Development Act programs; historical grants; employment services-unemployment compensation. James R. Hillman, letter, Oversight on the Problems and Barriers Attendant to Indian Tribal and Organizational Participation in Federal Domestic Assistance Programs, *Hearing Before the Senate Select Committee on Indian Affairs*, 95th Cong., 1st sess., pp. 46, 48 (Sept. 8, 1977).

[345] Goldie Denney, testimony, *Seattle Hearing*, vol. I, p. 213.

[346] Ibid., p. 210.

[347] Gerald Thomas, testimony, ibid. p. 179.

> Actually all of the services are provided by Quinault people themselves and not provided directly by the department of social and health service staff.[348]

The inapplicability of State standards to Indian foster homes has been one factor among many contributing to a tremendous loss of Indian children from the tribes. Indian homes have been judged substandard as foster and adoptive homes by State social services workers. Judging their actions to be in the "best interest of the Indian children," State agencies have removed them from reservations and placed them in non-Indian homes. An Indian girl who went through this process grew up to become a social services worker for the State, which took her from her reservation. She later traced her records to learn about her background and to find her sister, who had been placed with another family elsewhere in the State.[349] As an adult she became tribal chairwoman of the Lower Elwhas.

Situations like this, often without such a happy ending, led to passage of the Indian Child Welfare Act of 1978.[350] This act recognizes that tribal courts are the appropriate authority to determine Indian child placement. Though only recently enacted, the act has the potential for reversing the process that for so many years has robbed reservations of their most important resource, their offspring.

Child welfare demonstrates the combination of funding and control problems in the interaction of tribal and State governments. A range of cooperative possibilities exist.

One alternative followed with respect to elderly programs involves 1978 amendments to the Older Americans Act, which creates a direct grant program to Indian tribes.[351] Previously, Indians were only eligible for funds through Title III programs administered by State and local agencies. Indian and non-Indian governments have worked together to varying degrees to iron out their differences concerning the administration of Federal domestic assistance funds. The starting point for efforts at cooperation has much to do with the relative strength of the tribes and State governments to pursue satisfactory solutions. Programs that channel funds through State agencies place tribes at a disadvantage, because they place the States in a position of power regarding the ultimate distribution of assistance money.

National Initiatives

Some of the disputes between State and local governments and tribes, involving far-reaching jurisdictional questions and relative rights to ownership or control of land, water, and other natural resources, have been brought to court for final determination. There are several drawbacks to the litigative process, however, that make it less than an ideal means for settling some of these disputed issues. There is the simple fact that litigation takes time—years in many of the disputes involving Indian and non-Indian governments. Complex litigation is very expensive. Results are not predictable and they are subject to reversal through the appellate process. Often the issues decided do not completely settle the disputed matter.[352]

The subject of agreements between State and local governments and tribes rather than litigation has been recently explored in the Congress and has been a topic of interest to some national Indian and non-Indian organizations. Agreements between Indian and non-Indian governments regarding the exercise of the jurisdiction possessed by each contain an element beyond a mere contractual relationship between the two. An important concept of Federal Indian law is that States are not free to exercise jurisdiction over tribes. They are restricted from the exercise of such authority due to the preemption of that authority by the Federal Government. In 1959 the United States Supreme Court held that the State could not exercise its jurisdiction on an Indian reservation if to do so would infringe on the power of Indian people to govern themselves.[353] In 1971 the principle was further advanced when the Supreme Court determined that a State could not exercise civil court authority over a sales transaction between an Indian and a non-Indian occurring on the

[348] Denney Testimony, ibid., p. 206.
[349] Patricia Elofson, testimony, *Seattle Hearing*, vol. II, pp. 82–84.
[350] 25 U.S.C. 1901–63 (Supp. II 1978). The legislation was drafted by the Association on American Indian Affairs, which supported the bill through a study of Indian child adoption and foster care placements. In the worst States surveyed, Indian children were being placed in foster care at a rate 20 times that of the non-Indian population. Reprinted in *Task Force Four Report*, p. 177.
[351] Older Americans Act Amendments of 1978, Pub. L. No. 95–478, Title VI, 42 U.S.C. 3057 (1978).
[352] E.g., the Washington treaty fishing rights litigation involving the Puyallup Tribe has been to the United States Supreme Court three times over a 10-year period.
[353] Williams v. Lee, 358 U.S. 217 (1959).

Blackfoot Reservation, despite a tribal ordinance authorizing the State to do so.[354] Then in 1977 a Federal district court ruled that the State of South Dakota could not exercise jurisdiction over an Oglala Sioux child from the Pine Ridge Reservation, despite the fact that a tribal court had adjudicated her mentally ill and had ordered her committed to a State institution.[355]

The central issue in each of these cases is that the Federal Government had not granted authority to the States involved in each of these instances to assert State authority over reservation Indians. Although the principle being applied here is a protection to tribes and their members against the assertion of undesired State authority, it also precludes tribes and States from acting in concert on jurisdictional matters when it is in their mutual interest to do so.

To address this problem, Senate Bill 2502 was introduced and referred for consideration to the Senate Select Committee on Indian Affairs. The bill, called the Tribal-State Compact Act of 1978, was the subject of hearings in March 1978 that disclosed what appeared to be part of a large body of intergovernmental agreements between Indian and non-Indian goverments. These included:

- an understanding by which Arizona State civil orders were upheld in the tribal court of the Gila River Reservation and vice versa;[356]
- an agreement between the Leech Lake Band of Chippewas and the State of Minnesota governing the enforcement of hunting, fishing, and rice gathering regulations and a collection rebate system to return to the tribe its share of State-collected sales, motor vehicle, cigarette and liquor tax revenues;[357]
- agreements between the Warm Springs Reservation and the State of Oregon and local governments involving hunting and fishing, liquor sales, occupational safety, parole and probation, and environmental control.[358]

Although the testimony received at the Senate hearing was overwhelmingly in favor of the compact act concept, there was an expression of some skepticism, based on the lack of knowledge about the nature and extent of existing agreements and possibilities for abuse if such an act were passed.[359]

Philip Samuel Deloria, then director of the American Indian Law Center, recommended that a study be initiated to reveal the types of agreements in existence, with the possibility that the proposed act might be offered in amended form if necessary, based on a thorough understanding of the issue. The idea of doing such a study was realized in the form of a Commission on State-Tribal Relations, cosponsored by the National Congress of American Indians, the National Tribal Chairmen's Association, and the National Conference of State Legislatures. Since its founding in 1978, the commission has documented a number of formal and informal agreements between States and tribes as well as many cooperative working relationships involving water pollution control and water management, forest management, nutrition programs for the elderly, employment referrals, hunting and fishing rights and enforcement, law enforcement training programs, and taxation agreements.[360]

The impetus for these agreements has varied as widely as the agreements themselves. The local law enforcement agreements between the Quinaults and Grays Harbor County and between the Yakima Indian Nation and Yakima County, Washington, resulted from a desire among the communities involved to utilize their resources more effectively to solve common problems.[361] Other arrangements were created to settle disputes being litigated or to avoid litigation. Examples of this include the hunting and fishing agreement between Minnesota and the Leech Lake Chippewas,[362] mentioned previously, and an agreement with the State of Colorado for cooperative control of hunting within an area of the State in which tribal hunting rights exist.[363]

The involvement of the National Conference of State Legislatures in this study of tribal-State cooperative agreements is indicative of recent interest among non-Indian governmental associations in becoming involved on a national level with the resolution of Indian and non-Indian conflict.

The National Conference of State Legislatures was founded in 1975 "to help meet the challenges of

[354] Kennerly v. District Court, 400 U.S. 423 (1971).
[355] White v. Califano, 437 F. Supp. 543 (1977).
[356] U.S., Congress, Senate, Select Committee on Indian Affairs, *Hearing on S. 2502*, 95th Cong., 2d sess. (1978), p. 36 (hereafter cited as *Tribal State Compact Hearings*).
[357] Ibid., pp. 303–59.
[358] Ibid., p. 260.
[359] Philip Samuel Deloria, testimony, *Tribal State Compact Hearings*, pp. 31–34.
[360] Many of these cooperative arrangements are summarized in Commission on State-Tribal Relations, monthly reports, January, February, and March 1979.
[361] *Tribal State Compact Hearings*, p. 305.
[362] Ibid., pp. 303–59.
[363] Ute Mountain Tribe v. State of Colorado, Civ. Act. No. 78-C-0220 (D. Colo. July 6, 1978) (consent decree).

today's complex system." As the "official representative of the country's 7,500 legislators,"[364] it has established an Indian Affairs Task Force composed of 20 members from 17 States.[365] Its purpose is to find alternatives to litigation to solve problems between tribes and States.[366] The task force has also adopted policy statements on education, water rights, and jurisdiction that were approved by the organization's main body, the State-Federal Assembly.[367]

The policy statement on jurisdiction rejected litigation as an approach to disputes and recommended negotiation between States and tribes as the principal method for settling jurisdictional differences. Failing this, the policy suggests congressional legislation as the course to follow in disputes, although no particular legislation or legislative goals were given. Finally, the task force suggested the creation of a commission composed of legislators, Indian leaders, and Federal representatives charged with developing a formal mechanism for the discussion and resolution of jurisdictional problems.[368] This recommendation led to the formation of the Commission on State-Tribal Relations, consisting of seven State legislators and seven tribal leaders. As discussed earlier,[369] the efforts of the commission have produced a record of many cooperative efforts among tribes and States.

In addition to the support it gives to the Commission on State-Tribal Relations, the Indian Affairs Task Force has sponsored a series of issue-oriented meetings among tribal and State representatives to discuss their experiences and share ideas for mutual cooperation. One of these dealt with water rights, highlighting the interest of both States and tribes in avoiding 10- to 20-year legal battles over water rights, negotiating only after litigation or the threat of it had focused sufficient attention and energy on the dispute so as to support the work necessary by the parties involved to reach an agreement.

For example, the Uintah and Ouray Reservations were at odds with the State of Utah over development of the Central Utah Project, which was to divert water for State purposes that might be subject to tribal legal claims. Rather than risk project funds, pending the outcome of a lawsuit, the State chose to negotiate.[370] To do so, both parties had to develop the necessary expertise with engineers, planners, economists, and lawyers. At that point, negotiation could proceed.[371] A similar problem regarding the lack of an adequate data base was expressed by the tribal attorney representing the Ak Chin and Papago Tribes in their water dispute with the State of Arizona.[372] Indeed, the problem of inadequate data was recognized by the Regional Team of the Federal Task Force on Washington State Fisheries during its attempts to negotiate a settlement to the treaty fishing rights dispute in that State.[373]

The efforts of the National Conference of State Legislatures are an encouraging beginning in the process of isolating and addressing factors crucial to successful negotiations between States and tribes interested in settling disputes outside the judicial arena.

Another national organization of governments that has become involved in the area of Indian and non-Indian conflict is the National Association of Counties (NACO). Founded in the 1940s, NACO describes itself as "the only national organization representing county government in the United States." Its purpose is to strengthen county governments to meet the needs of all Americans.[374] Its Indian Affairs Committee was created by some NACO members in 1977 in response to recommendations of the American Indian Policy Review Commission of the U.S. Congress. Specifically, NACO's Western Interstate Region (then called the Western Region District) passed a resolution recommending that Congress pass legislation establishing that, "States have the exclusive jurisdiction and authority in all executive, legislative, and judicial matters over all non-Indians and non-Indian lands, and interest in lands existing wholly or in part within

[364] National Conference of State Legislatures, *On Behalf of Our Nation's State Legislatures (undated), p. 1.*
[365] Sue Gould, testimony, *Hearing Before the U.S. Commission on Civil Rights, Washington, D.C.*, Mar. 19-20, 1979, vol. I, p. 100 (hereafter cited as *Washington, D.C., Hearing*).
[366] Ibid.
[367] Ibid., p. 101.
[368] National Conference of State Legislatures, *Goals for State Federal Action, Policy Resolutions of the National Conference of State Legislators 1978-1979*, p. 96.
[369] Gould Testimony, *Washington, D.C., Hearing*, vol. I, p. 101.
[370] National Conference of State Legislatures, State and Indian Water Rights, Summary of remarks of Dee Hansen, Utah Department of National Resources, *Meeting Summary*, p. 1 (May 31 and June 1, 1979).
[371] Summary of remarks of Daniel Israel, attorney for Unitah and Ouray Tribes, ibid., p. 3.
[372] Summary of remarks of William Strickland, ibid., p. 4.
[373] James Waldo, testimony, *Seattle Hearing*, vol. III, pp. 13-14.
[374] National Association of Counties, *American County Platform and Resolutions 1978-1979*, p. 1.

the geographic boundaries of any Indian Reservation."[375] This directly contradicted the recommendation of the American Indian Policy Review Commission, which was viewed by the NACO group as saying that "tribal government should have authority to exercise jurisdiction over non-Indian people and property within the reservation boundaries."[376] The Indian Affairs Committee was set up to review the recommendations of the American Indian Policy Review Commission.[377]

In May 1978 a majority of the Indian Affairs Committee adopted a policy calling on Congress to enact legislation "which clearly defines the nature and scope of tribal jurisdiction."[378] The committee asked NACO to suggest legislation to Congress that "makes it clear that governmental powers granted tribes by the Congress are limited to the government of members and their affairs."[379] The committee recognized that the implementation of State jurisidiction would require the abrogation of some rights that courts had already adjudicated to exist in tribes. For example, States would have jurisdiction on reservations over all persons who are not tribal members, presumably for all purposes. Another recommendation would be to award States the authority to regulate non-Indian hunting and fishing on reservation land and the authority to regulate tribal members exercising off-reservation hunting and fishing rights. The committee suggested a significant increase in State jurisdiction over crimes committed on reservations and also quantification of tribal rights to water only up to the levels currently being utilized.[380] All of these recommendations would constitute reversals of existing law or policy to the detriment of tribes. Although they were suggested as measures to clarify confusion, many of the tribal rights that would be removed by these suggestions have been established through litigation or statute in specific cases over many years.

The two-page proposal was directed to the passage of legislation governing all reservations across the country, despite differences in rights recognized by various treaties and other circumstances that differ among the tribes. The vice chairman of the Indian Affairs Committee acknowledged that this approach would be unlikely to work. He observed that "every Indian reservation is different, and it's going to be difficult to establish Federal legislation that's going to control and develop an aspect for all tribes."[381]

NACO did not adopt this policy statement but rather accepted the approach of the two-person minority on the committee, one of whom was a Navajo tribal member.[382] The final policy does not attempt to abrogate existing rights, but merely poses questions to be resolved by Congress on issues that are confused by historically conflicting Federal policies. Even in this version, however, there is a failure to recognize that questions over some issues have been answered through litigation in specific cases, settled by agreement in others, and addressed legislatively in others. It is not clear whether this policy is asking Congress for across-the-board legislation on such matters as hunting and fishing rights, criminal and civil jurisidiction, and control over natural resources development.[383]

The process through which the policy was adopted provides some understanding of the interests it represents. The structure of NACO is such that only standing committees can propose resolutions to the board of directors, which then forwards them to the full membership. Since the Indian Affairs Committee is not a standing committee, it must present its resolution to each standing committee that might be concerned with the resolution. That meant a full debate before each committee between the proponents of the majority and minority positions. Following this full debate, the vote favored the positions held by only 2 of the 20 members of the Indian Affairs committee.

The point to be made here is that a relatively small number of people can influence the policy of a large national organization. Had there been no debate, there might have been an adoption of an unopposed majority position put together by representatives of counties having a direct involvement in the matters being considered due to their proximity to tribal governments. Although the majority of the national organization might have little interest in Indian and non-Indian relationships, the weight of this large organization can be placed behind the judgment of a very few who might not actually represent a majority view within the organization.

[375] *Washington, D.C., Hearing*, vol. II, exhibit 17, pp. 13-14.
[376] Charlotte Williams, president, National Association of Counties, testimony, *Washington, D.C., Hearing*, vol. I, p. 103.
[377] Charles Patterson, testimony, ibid., p. 104.
[378] *Washington, D.C., Hearing*, vol. II, exhibit no. 17, p. 307.
[379] Ibid.
[380] Ibid., p. 337.
[381] Patterson Testimony, *Washington, D.C., Hearing*, vol. I, p. 107.
[382] The only Indian NACO member.
[383] *Washington, D.C., Hearing*, vol. II, exhibit 17, pp. 333-35.

Practically, the effect can be the appearance of wide-based demand for radical change generated by a small group within an organization. The process could easily lead to legislative action in Congress based upon the views of a vocal but small group appearing to be much larger than it actually is, a factor that should be considered by national lawmakers.

Findings

Civil Rights Violations

1. Recent conflicts over Indian rights have exacerbated the continuing equal protection problems Indians face.

2. Non-Indians have erroneously attacked and characterized Indian rights as unlawful discrimination against non-Indians.

- Indians' civil rights have been violated throughout history.
- Civil rights violations are promoted by public ignorance of Indian rights and by the failure of appropriate parties to respond promptly to any infringement of Indian rights.
- Although Indians face civil rights problems similar to those of other minorities, the context in which these occur is unique.

State and Local Governments

1. Since they represent primarily non-Indian constituencies, State governments may be expected to continue promoting non-Indian interests in matters of conflict.

2. Some States have played a direct role in fostering conflict and resistance when Indians assert their rights.

3. States and tribes have varied greatly in their responses to situations of conflict and common problems. State actions run the gamut from actively pursuing cooperative agreements with tribes to using physical force against Indians.

4. Recently, some State and local governments have taken a collective approach to conflicts with various Indian tribes by working through established national organizations of government. Although this development is promising for the negotiation of many issues, it could also have the potential of increasing State power at the expense of tribal rights and tribal governments.

Recommendations

Civil Rights Violations

1. An Office of Indian Rights should be reestablished, with an adequate staff, within the Civil Rights Division in the Department of Justice.

2. Community Relations Service personnel of the Department of Justice should be more available to help communities resolve conflicts involving Indian tribes.

State and Local Governments

1. Congress should support efforts by tribal and non-Indian governmental leaders to negotiate conflicts and reach cooperative agreements. Any broad jurisdictional waiver of rights by tribes to effect such agreements should be accompanied by an administrative review process that protects tribal rights within the Department of the Interior.

Chapter 3

Fishing in Western Washington—a Treaty Right, a Clash of Cultures

Introduction

For most of this century, Indians and non-Indians in the Northwest have differed over their relative rights and privileges to participate in and control a lucrative crop—fish. The differences have often reached the level of what has sometimes been characterized as a "fish war." Although legal battles in the controversy date back to the turn of the century, the conflict has intensified within the last 30 years. Fighting has occurred on the water, in the courtroom, in the legislature, and between government agencies.

The principal players in the fishing rights dispute can be divided into two categories, those who catch fish and those who regulate the catching. Although the treaties of the United States with the Indian tribes do not limit the species of fish or shellfish involved, the conflict thus far has centered around several species of salmon and a species very similar to salmon called steelhead trout, which pass through the waters in and beyond Washington State.[1] A brief description of these fish and their migratory patterns will be given later, since a basic knowledge of the nature of these particular fish helps explain the interrelationships of the people involved in the dispute.

The fishcatchers consist of two groups, Indians and non-Indians. The Indians involved are only those in northwestern Washington who have specific rights to catch fish because of their membership in tribes that negotiated treaties recognizing these rights with the Federal Government in the mid-1850s. The non-Indians subdivide into two classes, commercial and sport. Sport fishermen catch fish with a rod and reel for pleasure and personal use. Commercial fishermen use many types of nets, multiple hooked lines, and other gear to catch large amounts of fish for sale. Somewhat between the two classes are the commercial charter boat operators who ferry sport fishermen to deep water areas where they catch fish using a rod and reel.

Those who regulate fishcatchers include tribal governments; two agencies of Washington State, namely, the Washington Department of Game and the Washington Department of Fisheries; and several agencies of the Federal Government, including the Department of Commerce, the Department of the Interior, and the State Department when international matters are involved. A Federal body called the Pacific Fishery Management Council regulates fishing in the 3- to 200-mile zone off the Pacific Coast, and the International Pacific Sockeye Fishery Commission regulates the taking of certain species for 3 months each year by Canadian and U.S. fishcatchers in the Strait of Juan de Fuca, which separates the two countries. Part of the complexity of the fishing controversy stems from the fact that many of these agencies are regulating the same fish at different places or different points in time.[2]

[1] A significant portion of the conflict has occurred in Oregon.

[2] There are fish regulators beyond the Washington State area, such as the Northwest Pacific Fishery Management Council whose regulations have an effect on these same fish. There are also agencies that regulate things other than fish but whose exercise of authority can profoundly affect fisheries. For example, agencies that build or operate dams, such as the Army Corps of Engineers and the Bonneville Power Administration, are important indirect fish regulators as well, due to their control over stream flows, pollution levels, etc.

Numerous enforcement agencies have been charged with carrying out various laws controlling fishing in this part of the country. Among them are tribal fisheries police; Washington State officers from each of the two departments; and Federal enforcement officers from the National Marine Fisheries Service of the U.S. Department of Commerce, the Coast Guard, and occasionally the United States Marshals Service. Lawyers and technical experts employed by tribal, State, and Federal governments argue at times before tribal, State, and Federal judges to enforce regulations and, more important, to define the relative regulatory jurisdiction of the governments involved. Since the matter of relative fishing rights between treaty Indians and non-Indians in this geographical area was decided by a U.S. district court in 1974, the judiciary has also been directly involved in regulating the fishery. Among non-Indians, fishing advocates are in associations named for the type of gear they use, e.g., gillnetters, purse seiners, trollers, reef netters, charter boat operators, and various sportsmen's groups. Although each tribe involved is a distinct political unit, tribal advocates coordinate their efforts through the Northwest Indian Fisheries Commission, which consists of one commissioner from each of the treaty areas in northwestern Washington.[3]

The roots of the fishing conflict date back to the mid-1850s when the Federal Government chose to facilitate settlement of the State by non-Indians through treaties with the Indian tribes. Among other provisions, these treaties included cessions by the tribes of vast amounts of territory with guarantees of continued rights to fish at the Indians' customary fishing areas on as well as off the newly created Indian reservations. As the non-Indians learned the commercial and recreational value of this resource, and as technology facilitated its transportation to distant markets, both the fish resource and the guarantees of the treaties were strained to make room for commercial exploitation.

Throughout the late 19th century and all of the 20th, there has been a conflict—dormant at times, violent at times—between Indians and non-Indians over this valuable asset. The history of this struggle provides important lessons necessary to an understanding of the conflict between Indian and non-Indian.

History

What is known today as Washington State was once the sole property of several Indian tribes. The heavily forested western portion of the State was occupied by Indian tribes whose members had learned to exploit efficiently the natural bounty of the region. Central to both their physical and cultural existence was their understanding of the natural fish resource. Although many species of fish and other animals of the sea were important elements of Indian diet, salmon held and still holds a special place in Indian culture in this region. Salmon were the mainstay of the diet and subjects of religious ceremonies in tribal cultures. The religious rite called the "first salmon ceremony" expresses the reverence of the Indians for the resource that has sustained their numbers for centuries.[4]

Salmon were and still are a major component of tribal commerce. Indians have been catching salmon for trade with other tribes since before treaty times.[5] Evidence also suggests that increased non-Indian demand for salmon spurred the growth of Indian commercial salmon fishing in the decade before treaties were negotiated. Non-Indians relied on Indian fishing to supply salmon until non-Indians developed substantial commercial salmon fisheries of their own in the late 1870s, more than 20 years after the treaties were signed.[6] Indeed, it is the commercial value of this resource that has provided the basis for the continuing battle over who has the right to take them.

Before continuing the description of the controversy, a word must be said about the nature of salmon in the Pacific Northwest. Salmon, an anadromous fish, spawn in freshwater streams or lakes. The young develop in freshwater and then travel downstream to the marine areas, which in this case are the Puget Sound, the Strait of Juan de Fuca, and on to the Pacific Ocean. After reaching maturity in ocean waters, the salmon follow instinct back upstream to their point of origin, where they spawn a new generation, they die, and the cycle begins anew.

There are variations on this pattern for each of the five species of salmon that inhabit these waters.

[3] There is also a commission representing tribes along the Washington-Oregon border. This fishery has a separate litigative history from the northwest Washington case area studied in this report and is included only tangentially.

[4] United States v. Washington, 384 F. Supp. 312, 350, 351 (W.D. Wash. 1974), *aff'd.* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976).

[5] 384 F. Supp. at 351.

[6] Joint Appendix 371-372, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, —U.S.— 99 S. Ct. 3055 (1979) (hereafter cited as *Joint Appendix).*

Different species spend varying amounts of time in fresh and saltwater so that the life cycle may be completed in anywhere from 18 months to 7 years. At maturity they usually weigh from 2 to 60 pounds, and the route covered by these migrants may extend to thousands of miles.[7] An important variation among these fish dictates the methods used to catch them. Some fish will bite a hook while others can only be captured by net or other means designed for a nonbiting fish. The propensity of any species to bite a hook is also related to the portion of the life cycle the fish is in. It is common for salmon to refuse to feed while heading upstream to spawn, and this has implications for the appropriate location of a hook and line fishery.[8]

Another important fact of salmon life is that these fish, which intermingle in marine areas, separate into distinct runs or groups for the swim upstream to their spawning areas. Within a few days each year, these runs are fairly predictable as to course and timing, and somewhat less so with respect to number.[9] Thus, given the necessary fishing gear, most or all of a fish run can be intercepted within a few days or a few weeks at critical points along the migration route.

Similar to salmon in most respects is a species of trout commonly known as steelhead. Some important differences are that steelhead will bite a hook in freshwater and put up a great fight while doing so, making them a highly prized stream sport fish. They generally do not die immediately after spawning the first time in the rivers, so their river life is longer and the fish are generally in better condition than salmon in the upstream areas inland.[10] So important are these fish to the sportsmen in the area that a separate State agency, the Department of Game, which is more directly aligned with sporting interests than the Department of Fisheries, regulates them.[11] The designation of steelhead as a "game fish" by the State, despite its similarity to salmon, is a salient factor in the development of the controversy. The Indian view of steelhead varies among tribes, from treating them as if they were another variety of salmon to recognizing them as a different variety of fish, not due the reverence shown toward salmon.[12]

The way of life among the Indian fishing tribes of the western portion of what became the Washington Territory was to live off the land and water. They subsisted through hunting, fishing, and gathering.[13] There was also extensive trading among the Indian groups in western Washington that enabled them to acquire food, raw materials, and manufactured goods. The trade, which involved both necessities and luxuries of native life, existed because of the variation in available local resources.[14] Generations of observation had resulted in an understanding of the ways of salmon and other sea life, and it was tribal custom to take fish for food and commerce efficiently and without damaging the continued existence of the species. Many of the tribes were river fish catchers. They waited at the mouths of the rivers or farther upstream for mature fish to return, channeled for the final effort to reach the spawning areas.[15] A barrier such as a fish trap or a net stretched across the stream permitted fish to be easily caught and also allowed control over the number of fish permitted to escape upstream to spawn.

Other tribes developed methods for taking fish by boat in the marine areas. The Makah Tribe, for example, located at the northwestern tip of the continental United States, was able to take fish returning to local streams and could cull a great number of fish from the migrating runs passing by tribal villages on their way to inland streams. The Makah fishing effort also extended to the use of boats in the Strait of Juan de Fuca, where the inbound fish could be intercepted.[16]

Migration and State Regulation

Non-Indians came to settle this land in the great westward thrusts of the 19th century. By the mid-1850s Washington, which had been part of the Oregon Territory, became a separate territory administered by the Federal Government.[17] At that time, there was enough contact between Indians and non-Indians in the area to warrant meetings between

[7] Northwest Indian Fisheries Commission, Hoh, Lower Elwah, Lummi, Makah, Muckeshoot, Nooksack, Port Gamble, Quileute, Quinault, Upper Skagit, Sauk-Suiattle, Skokomish, Squaxin, Suquamish, Swinomish, and Tulalip Indian Tribes, *Tribal Report to the Presidential Task Force on Treaty Fishing Rights in the Northwest*, vol I, pp. 4–6 (1977) (hereafter cited as *Tribal Report)* (Commission files).

[8] 384 F. Supp. at 384.

[9] *Id.* at 385–87.

[10] *Tribal Report*, vol. I, p. 5.

[11] 384 F. Supp. at 327. The Washington Department of Game is actually a nearly autonomous governmental body controlled by sports persons.

[12] Christian Penn, interview in Forks, Wash., Aug. 10, 1977; Betsy Trick, interview in Ilwaco, Wash., Aug. 3, 1977.

[13] 384 F. Supp. at 351.

[14] *Joint Appendix*, 364, 370–72.

[15] 384 F. Supp. at 350–52.

[16] *Id.* at 364.

[17] Act of Mar. 2, 1853, ch. 90, 10 Stat. 172 (1853).

the first appointed Territorial Governor, Isaac Stevens, and the Indian inhabitants of the area. Negotiations with the Indian tribes were conducted in peacetime. No wars were fought with the Indian tribes in this territorial area of the country, and treaties were not imposed upon conquered tribes to set the terms of coexistence. There were, instead, a series of negotiations among sovereigns for the purpose of extinguishing Indian title to the lands of what would become the State of Washington in return for promises of protection from the onslaught of non-Indian settlement in the land areas that tribes reserved for themselves. In the 6- or 7-month period that began in December 1854, five treaties were negotiated and signed with the tribes of western Washington and subsequently ratified by the United States Senate.[18]

In all these treaties there are two provisions concerning the taking of fish. One secures to the tribes an exclusive right to take fish within the boundaries of the reservations. The other, which has been at the center of the controversy, says in part with minor variations: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory."[19]

It was evident to non-Indian negotiators of the treaties that fishing was central to the existence of these tribes and that the relatively small land areas retained by the tribes did not contain fishing sites sufficient to assure them an adequate supply of fish.[20] The treaty provision quoted above was designed to alleviate the Indians' fear that their food supply would be lost with a Federal promise that tribal members could fish where they had always fished in areas outside the newly established reservations. Governor Stevens gave oral assurances that the Federal Government had no desire to interfere with Indian fishing.[21] At that time, however, fish were plentiful and there was no competition with non-Indian commercial fisheries.[22]

The Indian fishing monopoly was ended by the beginning of this century when the transcontinental railroad was completed and major improvements in the technology of the canning industry provided access to distant markets needed to support a large, non-Indian commercial fishery. The reduction in the numbers of fish available, attributable to rapid expansion in non-Indian fishing, was augmented by seemingly unrelated factors that had a negative impact on water quality and spawning grounds. Such factors included logging, industrial pollution, residential and commercial development of property, and dam building.[23] Between 1910 and 1915, for example, the number of canneries jumped from 23 to 41.[24] Average annual salmon catches dropped from 10.7 million between 1914 and 1919 to 6.7 million between 1920 and 1929.[25] To make up for depletion of the resource, the State began building fish hatcheries in 1895.[26] Since statehood, Washington has also regulated the industry to increase spawning escapement in a way that has benefited non-Indians. One method chosen to do this was to make it illegal to fish commercially with nets for salmon in rivers. In effect, tribal river fishermen were told that their Federal treaty right was functionally worthless because their efficient gear was no longer allowed for commercial purposes, only for the subsistence of the Indian fishcatcher and family.[27]

Throughout the 20th century, the State has used its regulatory authority to favor predominantly non-Indian fishing methods, consisting of motor-powered boats in marine waters for salmon and a hook and line fishery for steelhead in the rivers. The regulations, backed up with the police power of the State, have left the Indians outmatched in marine waters by the better equipped, non-Indian fleet and closed out of the rivers by gear restrictions.[28]

In the case of steelhead trout, the gear restrictions came through Washington State's designation of steelhead as a "game fish" in 1925.[29] Catching them with a net became a State crime as did selling them. This was a major blow to some tribes that relied on steelhead as a food source in the winter when salmon did not run the rivers.[30] Yet regulations of the State Department of Game did not recognize the

[18] Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927; Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933; Treaty of Neah Bay, Jan. 31, 1855, 12 Stat. 939; Treaty of Olympia, July 1, 1855, 12 Stat. 971.

[19] Treaty of Medicine Creek, Dec. 26, 1854, Art. III, 10 Stat. 1132, 1133.

[20] *Joint Appendix*, p. 382.

[21] 384 F. Supp. at 355.

[22] *Id.* at 352.

[23] *Id.* at 334; Glenn H. Petry, *Pacific Northwest Salmon and Steelhead Fishing Report, The Economic Status of the Oregon and Washington Non-Indian Salmon Gillnet and Troll Fishery* (1979), vol. I, pp. 1-7 (hereafter cited as *Petry Report*).

[24] *Tribal Report*, vol. I, pp. 11-12.

[25] State of Washington, Department of Fisheries, *1975 Fisheries Statistical Report*, reprinted in *Petry Report*, vol. I, p. 21, table 6.

[26] *Tribal Report*, vol. I, p. 13.

[27] Ibid., p. 15.

[28] Ibid.

[29] 384 F. Supp. at 383.

[30] *Tribal Report*, vol. I, p. 23.

special rights or needs of tribes. The stated purpose of the State Department of Game is to preserve, protect, perpetuate, and enhance wildlife through regulations and sound, continuing programs to provide the maximum amount of wildlife-oriented recreation for the people of the State.[31] The State Department of Game, with its separate police force, enforced regulations created to facilitate sport fishing and disrupt Indian net fishing for steelhead.[32] In the early 1970s the view of the director of the game department was that it would be an abdication of his responsibilities to allow any off-reservation net fishing for steelhead by Indians unless ordered to do so by a court.[33]

Early Litigation

The first case to reach the United States Supreme Court dealing with Indian fishing rights in Washington State was *U.S. v. Winans.* [34] This case involved a private fishing company that had taken over an Indian fishing ground, claiming an exclusive right to hold it based on a State license. The company asserted that upon becoming a State, Washington became sovereign, and, as with other States, it had the right to control fishing in its rivers, including the right to grant exclusive fishing rights to a non-Indian, notwithstanding the treaty provision securing to Indians the right to fish. The U.S. Supreme Court held that the treaty guarantees survived Washington's entry into statehood and that the treaties were clearly more than empty promises. The Court applied an established principle of Indian law to these treaties, concluding that they would be read in the way the Indians would have understood them.[35] Taking note of the fact that the treaty was drafted by non-Indians whose language was foreign to the Indians and whose power was greater than that of the Indians, the Court reasoned that ambiguities in the language should be resolved in favor of the Indians. The Court held that technical language with legal implications not apparent to the Indians should be liberally viewed as conveying the common meaning of what was being said as the Indians would have understood it.

It was clear to the Court that the tribes would not have traded away most of the land in Washington for an empty right. The Court concluded that the State could not disregard the rights of the tribes in granting licenses to others and that Indian fishing rights included the right of passage, or easement, through the private lands of others in order to get to the usual and accustomed grounds and stations. The result of the case was confused, however, by the Court's recognition that the State did have some regulatory authority with respect to the exercise of Indian fishing rights. The nature and extent of that regulatory authority was left unclear and became the subject of future litigation.

In 1916 the Washington State Supreme Court handed down two decisions that were to set the basis for consideration of Indian fishing rights over the next quarter of the century.[36] In these cases, Indians had been arrested for fishing without State licenses and in places or at times prohibited by State regulations. That the tribal members were exercising their Federal treaty rights was of no concern to the State court since it determined, despite the *Winans* decision, that the treaties had never "reserved" any greater fishing rights to tribal members fishing off reservation than they had for anyone else. That meant that Indians as well as non-Indians were subject to the same State regulations. The State court also rejected the view that Indian tribes possessed any sovereignty, ruling that they were subject to the regulations of the State like any other group living within State borders.

Shortly after these cases were decided in Washington State, the U.S. Supreme Court decided a case originating in New York State.[37] This case involved criminal prosecutions against Seneca Indians charged with off-reservation fishing in violation of State conservation regulations. There were significant factual differences between this case and the Washington State situation, including the fact that the conveyance of land from the tribe occurred after New York had become a State rather than before. Thus, the power of the State to exercise appropriate conservation authority over fishing outside reservation areas was known before the land in question was transferred. In addition, the language of the land transfer retained a "privilege" for the tribe rather than a "right." This language was critical because the exercise of a privilege is far more subject to regulation than the exercise of a "right."

[31] Rev. Code Wash. Ann. §77.12.010 (Supp. 1979).
[32] 384 F. Supp. at 394–96.
[33] *Id.* at 393.
[34] 198 U.S. 371 (1905).
[35] Worcester v. Georgia, 6 Pet. 151, 582 (McLean, J., concurring) (1832).
[36] State v. Towessnute, 154 P. 805 (1916); State v. Alexis, 154 P. 810 (1916).
[37] Kennedy v. Becker, 241 U.S. 556 (1916).

In any event, the facts in this case were seen as sufficiently close to those in the Washington State cases to suggest to the Attorney General of the United States, over the contrary urging of northwest tribes, that appeal of the Washington cases to the U.S. Supreme Court would be fruitless.[38] Indeed, in a later criminal case brought against two Yakima Indians fishing in violation of State regulations, at usual and accustomed places off reservation, the State supreme court again relied on the earlier State cases as well as the U.S. Supreme Court decision in the New York case to uphold the convictions.[39]

This case was also not pursued to the U.S. Supreme Court, probably on the same theory that the appeal would not succeed. At least as late as 1934, it was the opinion of the Solicitor of the Department of the Interior that these cases prevented Indians from constructing fishing devices in violation of State regulations, as long as the State regulations were "reasonably adapted to the preservation of wild life in the waters of the State for the common benefit, and not in its intendment or operation a denial to the privileged Indian community of its right to fish."[40] This opinion also stated that Indians exercising off-reservation commercial treaty fishing rights could be required to comply with State licensing laws and sales taxes as long as such laws were not administered in a discriminatory manner.[41]

The effect of these litigative setbacks was devastating to some tribal economies, driving the members into poverty.[42] The Federal Government had no real solutions to offer. No further challenges were brought against State authority through the avenue of an original suit in Federal court or through any other effective means.

The Federal Government at this time played only a reactive role in these cases, responding to criminal cases brought against Indians attempting to exercise treaty rights by asserting a defense against prosecution based on Federal treaty rights. The Federal Government did not remove Indian fishing from State regulation by placing it under Federal control exclusive of State interference. Nor did the Federal Government mount a factual attack on the State, forcing it to prove that State regulations, stated to be for conservation purposes, actually were needed for the preservation or conservation of the resource. Instead, it appears that State regulations were assumed to be supportive of that purpose and were permitted to block the exercise of off-reservation treaty right fishing. In effect, the treaty fishing right was rendered meaningless in 1916 and remained so for the next 26 years.

Washington State continued to claim untrammeled authority to regulate off-reservation Indian fishing until the next major challenge, which came in the 1940s. A Yakima Indian named Tulee was arrested and convicted by Washington State courts for fishing without a State license. The United States again played a reactive role as it defended Mr. Tulee in Washington State courts by asserting that the Yakima treaty prevented Washington State from applying its regulations to treaty fishcatchers. The State supreme court judged that the licensing regulation was not a treaty violation because it was not discriminatory. It applied equally to everyone in the State.[43]

This time, however, the Federal Government did not settle for the judgment of the State high court and pursued the matter to the U.S. Supreme Court. In 1942, 37 years after *Winans,* the State suffered the second setback in its otherwise complete control over the exercise of Indian fishing rights. The U.S. Supreme Court decided that, although State regulation of Indian fishing could be permitted for conservation purposes, the State could not require Indians to buy State licenses to exercise the federally-recognized Indian treaty right to fish.[44]

The judgment in *Tulee,* which required the State to refrain from regulating the exercise of Indian fishing rights except for resource conservation, was followed in 1951 with the Makah Tribe challenge to State regulations preventing off-reservation river net fishing.[45] In this case the Federal appellate court supported the claim of the Makahs that a State regulation prohibiting net fishing in rivers was not necessary for conservation purposes, because a brief closing of the river would have provided all the spawning escapement necessary. Failing to prove that the regulation was necessary, the State had no right to close the river to Indian net fishing.

Following the *Makah* case, a Puyallup Indian openly exercised the tribal treaty right to fish by net in the Puyallup River, which runs through the city

[38] *Tribal Report,* vol. I, p. 22.
[39] State v. Meninock, 197 P. 641 (Wash. 1921).
[40] Opinion of Solicitor Nathan R. Margold, Apr. 5, 1934, p. 4.
[41] Ibid., p. 6.
[42] *Tribal Report,* vol. I, p. 22.
[43] State v. Tulee, 7 Wash. 2d 124, 109 P.2d 280 (Wash. 1941).
[44] Tulee v. Washington, 315 U.S. 681 (1942).
[45] Makah Indian Tribe v. Schoettler, 192 F.2d 224 (9th Cir. 1951).

of Tacoma. The charge of gillnetting in violation of State regulations was thrown out of the State court and its dismissal upheld on appeal at the State supreme court level.[46] Six years later, however, the State supreme court acceded to a view that allowed the State to impose the brunt of its conservation measures on tribal fishermen. In this case, a member of the Swinomish Tribe was prosecuted for fishing in an area closed by the State for conservation purposes. The trial court acquitted the tribal member based on the defense that he was fishing under the treaty right. The State supreme court, however, reversed the trial court, ruling that periodic closures were reasonable and necessary to conservation of the resource because without them, Indians would be free to eliminate fish runs.[47] An implicit assumption made in reaching this decision was that the State was to be given great latitude to determine what was necessary for conservation, including the right to use a method of conservation protection that would allow non-Indian fisheries to catch most of the fish not being protected.

The State once again asserted its power to regulate Indian fishing off reservation in late 1963 by closing Indian fishing in south Puget Sound. Indians responded with organized protest. The center of the protest was a place known as Frank's Landing, an off-reservation fishing site of the Nisqually Tribe in the south Puget Sound area. Protest fish-ins were staged by the National Indian Youth Council and the newly formed Survival of American Indians Association, which gained national publicity with the assistance of celebrities, including Marlon Brando and Dick Gregory. Some of these events became violent confrontations when State officers used force—more than required, according to Indian allegations—in order to stop the protests, and Indians fought back.

Demonstrations were held at the Federal courthouse in Seattle and at the State capitol in Olympia as Indians demanded a halt to State interference with tribal fishing rights. Tribal fishing sites of the Muckleshoots and Yakimas also became demonstration sites as the controversy continued.[48]

The contest spawned a new case for U.S. Supreme Court review, consolidating legal actions by the State against the Puyallup and Nisqually Tribes of south Puget Sound. The legal actions were initiated by the State in the State court system for the purpose of obtaining a judgment declaring State regulations to be necessary for resource conservation and therefore legally applicable to treaty Indians under Federal case law. The lower State court obliged and issued an injunction preventing members of the Puyallup Tribe from fishing in violation of any State regulations.[49] The trial court also concluded that members of the Puyallup Tribe could no longer have any treaty fishing rights because, in its determination, the tribe no longer existed.[50]

The State supreme court was not willing to support its trial court completely, and it modified the result to recognize the existence of tribal treaty rights but upheld State regulation of tribal fishing as "reasonable and necessary" for conservation purposes. There was a conflict of opinion among the State supreme court judges stemming from a case decided 4 years earlier, based on a similar off-reservation treaty fishing rights provision. In that case, a Federal court of appeals decided that the State of Oregon would have to show that its regulations were more than "reasonable and necessary" for conservation of the resource. It would have to show that the regulations were "indispensable" to conservation.[51]

Although the State court in *Puyallup* ruled that requiring the Department of Fisheries to show its regulations to be "indispensable" to conservation was not required under the treaties, a dissenting judge thought that the standard set by the Federal court of appeals was the appropriate law to follow.[52] The United States Supreme Court went along with the State court on the standard to be used, saying that State regulation must be "necessary for the conservation of fish."[53] The Supreme Court held that the State can regulate time and manner of Indian fishing provided its regulations meet appropriate standards and do not discriminate against the Indians.[54] The opinion of the Court, however, offered no assistance in determining whether the

[46] State v. Satiacum, 314 P.2d 400 (Wash. 1957).
[47] Washington v. McCoy, 387 P.2d 942, 951 (Wash. 1963).
[48] American Friends Service Committee, *The Uncommon Controversy* (Seattle: University of Washington Press, 1970), pp. 108–12.
[49] Department of Game v. Puyallup Tribe, Inc., 422 P.2d 754, 768 (Wash. 1967).
[50] *Id.* at 756.
[51] Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169, 174 (9th Cir. 1963).
[52] Department of Game v. Puyallup Tribe, Inc., 422 P.2d 754, 766 (Wash. 1967) (Donworthy, J., dissenting).
[53] Puyallup Tribe v. Department of Game, 391 U.S. 392, 401–2 (1968).
[54] *Id.* at 398.

regulations at issue were, under the circumstances, reasonable and necessary for conservation.

The case was remanded to the State trial court for a determination of what regulation would be reasonable and necessary for the conservation of fish in the Puyallup River. In response to the U.S. Supreme Court decision, the Washington Department of Fisheries changed its salmon regulations to recognize an Indian net fishery in the Puyallup River, although the department restricted the area in which the nets might be used. The Washington Department of Game, however, continued its total prohibition of net fishing for steelhead trout.[55]

Bob Satiacum, the Puyallup Indian who thought he had won his case before the State supreme court in 1957, was back out on the river, among others, protesting the U.S. Supreme Court ruling and the resulting State regulations that again interfered with the exercise of his tribe's treaty right. There were no immediate confrontations with State law enforcement officers, because there were no fish to be caught in the Puyallup River this early in the season.[56]

Demonstrations were held at the State capitol 3 months later along with a renewed and determined protest fish-in at Frank's Landing. At this time, however, fish were running the Puyallup River, and confrontation ensued. Protestors were arrested by State enforcement officials amidst charges of violence and improper use of force by both sides. Fish caught by the Indians were sold to individuals and local restaurants for cash that was used as bail money.[57]

The State trial court upheld departmental regulations of the Washington fisheries and game departments as reasonable and necessary for conservation, even though the game department's regulation completely banned Indian net fishing for steelhead, while permitting thousands of anglers to take the fish for sport.

Once again, the case of Indian treaty right fishing was on its way up the judicial ladder. The State supreme court upheld the regulations of both departments, and the tribe appealed the game department ban to the United States Supreme Court. The State supreme court's rationale for allowing the game department ban on net fishing was that it was necessary to conserve the steelhead resource in the river. The court reasoned that the sport fishery in the river took a sufficient quantity so that when sport fishcatchers were finished, only enough steelhead were left to begin the next generation.[58]

The U.S. Supreme Court held this division to be illegal because its effect was to allocate the fish resource to the hook and line fishery, which was composed of non-Indian sportsmen. The Court said that the allowable catch must be apportioned between the sports fishery and the Indian net fishery. The Court did not establish a formula on its own but sent the case back for a further review by the State courts, which were to produce the appropriate division of the resource.[59]

A problem that arose in the case was the claim by the Washington Department of Game that most of the steelhead caught in the Puyallup River were actually hatchery fish produced by the State and paid for mostly by the licensing fees of sport fishermen. The U.S. Supreme Court did not decide whether and to what extent these fish were to be divided.[60] Three justices, however, expressed the view that the treaty does not obligate the State of Washington to subsidize Indian fishing. They would have decided that hatchery fish paid for by sports fishermen should not be included in the total to be divided.[61] Nothing was said, however, about how hatchery fish planted by Indians and captured by sportsmen would be accounted for.

As the *Puyallup* case moved up and down, through and between State and Federal courts, a case was being heard in Oregon that was to have a strong influence upon the Washington State fisheries. The Federal district court in Oregon was faced with State regulation of fishing that resulted in no fish for treaty Indians upstream on the Columbia River. Originally brought by Richard Sohappy and 13 other members of the Yakima Indian Nation, the case expanded to include the Umatillas and Warm Springs Indians, who also had treaty fishing rights on the Columbia River. These cases involved treaty rights to off-reservation fishing that were secured by

[55] Department of Game v. Puyallup Tribe, 414 U.S. 44, 46 (1973) (hereafter cited as *Puyallup II*).

[56] *Seattle Times*, June 13, 1968, p. 45.

[57] *Post Intelligencer* (Seattle), Sept. 6, 1968, p. 29, and Sept. 10, 1968, p. B; *Seattle Times*, Sept. 5, 1968, p. 59, Sept. 13, 1968, pp. 33, 75, Oct. 20, 1968, p. 7.

[58] 414 U.S. at 46.

[59] *Id.* at 48.

[60] *Id.*

[61] *Id.* at 49 (opinion of White, J., concurring).

essentially the same language as was used in the Washington Indian treaties noted earlier.[62]

The Oregon regulatory scheme banned fishing by net by anyone, including Indians, above a certain point in the river. As traditional Indian fishing sites were up river, the effect of this regulation was to allocate almost all of the harvestable fish to non-Indians. The State argued that as long as its regulations covered equally all those who fished, there could be no discrimination and the treaty guarantees were met.

The Federal district court disagreed. It found instead that the failure of the State to view Indians as a separate fishing group discriminated against Indians by allowing other user groups to take the fish before they could return to usual and accustomed tribal fishing grounds.[63] Although the State argued that the closure of upstream fisheries, including Indian fisheries, was necessary to conserve the resource, the court found that the definition of the word "conserve" as used by the State included distribution of fish between competing user groups. In reality, the prohibition of fishing at certain times and in certain places that the State called "conservation" was a form of allocation of fish favoring those groups in a position to harvest at the earliest point in time and place a returning run of fish. Then also, by allowing sports fishing at the same place and time that net fisheries were prohibited, the State discriminated against Indians who traditionally used more efficient gear at these places.

In order to correct what, in effect, was a denial of Indian fishing opportunity, the court required not only that the State consider Indians as a separate group, but also that it restrict other groups, as necessary, to assure that the Indians receive a "fair share" of the fish produced by the Columbia River system. Although the court did not attempt to spell out what it meant by a "fair share," it did retain jurisdiction to approach that problem as necessary in specific instances.[64]

The *Sohappy* case also made clear that the State must use a different standard in regulating Indian fishing from that which it can apply to non-Indians. In controlling non-Indian fishing, the State is free to pursue State objectives in management that, for example, might include such considerations as the effect of fishing regulations on the State's tourist industry. In regulating Indian fishing, however, the Federal right possessed by Indian tribes had to be considered separately and not made subject to the economic or social policy preferences of State government. The Federal court held that the State "may use its police power only to the extent necessary to prevent the exercise of that right in a manner which will imperil the continued existence of the fish resource."[65] The court went on to decide that to assure the Indians a "fair share" of the resource under the treaties, the State may adopt regulations permitting treaty Indians to fish at their usual and accustomed places at times and in a manner that it prohibits to non-Indians.[66]

Thus, the Federal court invalidated the argument of the State of Oregon that regulations for Indians that are different from those imposed upon non-Indians violate the rights of the non-Indians to equal protection of the laws under the 14th amendment to the U.S. Constitution.[67] In contradiction to the State's argument, the point of the case was to recognize Indians as a separate political group with treaty rights separate from the general population.

A simple analogy would be a contract between a supplier of goods and the Federal Government. Once the supplier transfers the goods, the supplier is entitled to payment. It is not an act of discrimination for the Federal Government to pay the supplier without paying a like amount to everyone else in the country. Indian tribes of the Northwest supplied the land base for the State. Part of the agreement was that they retain certain fishing rights, which were guaranteed by Federal promises. Honoring the promise is no more an act of discrimination than rendering payment to a supply contractor.

Despite the ruling by the Federal district court in Oregon, the argument that separate regulation of Indian fishing in accordance with treaty provisions violates the "rights" of non-Indians is one that has been made over and over again in subsequent cases arising in Washington State.

The history of legal maneuvering by two States attempting to maintain the control over the fisheries that they had successfully exerted for nearly a century provided the legal basis for a new Federal case in Washington State. Though the *Sohappy* decision dealt with only Oregon State, the treaty provisions were the same as those governing Indian

[62] Sohappy v. Smith, 302 F. Supp. 899, 904 (D.Or. 1969).
[63] *Id.* at 910, 11.
[64] *Id.* at 911.
[65] *Id.* at 908.
[66] *Id.* at 911.
[67] *Id.* at 907.

fishing rights in Washington. The combined experience of tribes, States, and the Federal Government wrestling with the meaning of treaty provisions is essential to an understanding of the progression of fishing rights litigation. The new Federal case was to become an attempt to stop the judicial merry-go-round by going back to the beginning—the treaties—to derive a thorough factual record upon which its decision and any future decisions could be based.

The Boldt Decision

The case of *United States v. State of Washington* [68] was filed in Federal district court in 1970. The U.S. Department of Justice filed the suit on behalf of seven fishing tribes in western Washington in response to a request by the Department of the Interior. The purpose behind filing the case was to extend the principles of the *Sohappy* decision to Washington State, i.e., to require Washington State to regulate its fisheries in a way that would recognize Indians as a distinct group, with rights beyond those of other fishing groups to a fair share of the resource.[69] A total of 14 tribes were eventually involved as parties whose interests were represented by private counsel as well as by the Federal Government as trustee.[70] The State, as a party to the suit, pursued its litigative positions through its Departments of Fisheries and Game. Commercial and sports fishing organizations were also permitted to file briefs in the case, although, except for the reef netters, they were not technically parties to the litigation.[71]

The litigation required 3-1/2 years to reach a decision interpreting the rights guaranteed by treaty to each of the tribes. The 1974 decision by Judge George Boldt in *United States v. State of Washington* was different in kind from all the decisions preceding it. It did not limit the review only to the "facts" existing at the time of the litigation. Nor did it merely pull together enough historical judicial precedent on fisheries cases to support whatever decision the court was to reach. Instead, the case was based on an exhaustive record dating back to treaty times. Historical analysis of the jargon used in treaty negotiating sessions; biological information on fish habits, migratory patterns, and catch sizes; development of the regulatory control exerted by the State over time; fishing patterns, trading practices, and lifestyles of the tribes involved both before and after treaties were signed; and similarly complex factual details provided the basis for the thorough and lengthy final decision of the district court.

The Federal district court issued a very extensive opinion detailing the meaning of fishing provisions of the treaties, the interference by the State government with the exercise of treaty fishing rights, and the measures necessary to reestablish Indian fishing rights. The major findings and legal conclusions in the case included the following:

1. That the treaties reserved fishing rights to Indian tribes that are distinct from those of other citizens.[72]

2. That the treaties prohibit both Indians and non-Indians from fishing in a manner that will destroy the resource or preempt the rights of the other.[73]

3. That the term "usual and accustomed fishing grounds and stations," as used in the treaties, meant that the off-reservation fishing rights of each tribe extended to every place the tribe customarily fished, no matter where such places were and whether or not such places overlapped with those used by any other tribe.[74]

4. That the right to "fish in common with the citizens of the territory" meant that the Indians reserved a fair share of the resource for themselves, not just a right of access to fishing places.[75]

5. That the share of the resource reserved included half the harvestable number of fish (i.e., those not needed for spawning) exclusive of catches for subsistence or ceremonial purposes.[76]

6. That the State may regulate Indian off-reservation fishing only to the extent necessary to preserve the resource and not in a way that limits treaty rights to State-preferred times, fishing methods, or purposes.[77]

7. That the State laws and regulations controlling Indian treaty right fishing at the time the case was decided were unlawful because: the State did not show that they were necessary to preserve and

[68] 384 F. Supp. at 312.
[69] *Id.* at 345.
[70] After the case was decided, more tribes joined the action to have their rights determined.
[71] 384 F. Supp. at 327.
[72] *Id.* at 401.
[73] *Id.*
[74] *Id.* at 332.
[75] *Id.* at 343.
[76] *Id.*
[77] *Id.* at 401.

maintain the resource; they discriminated against the tribes' treaty fishing rights; they were adopted and enforced in violation of appropriate standards and in derogation of treaty provisions.[78]

8. That the classification of steelhead as a "game" fish operated to restrict Indian fishing and to reserve that species for a special interest group (sportsmen), and violated the treaties.[79]

The exhaustive analysis of facts and law conducted by the Federal district court not only resulted in a long list of factual findings, but also provided a perspective of what had happened to treaty right fishing from its establishment to the present. It became clear that, over time, the treaty rights had been whittled away by State governmental and private encroachment to the point where they lost their intended meaning. They had largely become paper rights that did not translate into actual fish for Indians.

In order to protect the treaty rights of tribal fishcatchers, the court handed down a decree defining tribal fishing rights and an order providing the framework for a new management system. The order prevented Washington State from enforcing its existing fishing laws and regulations against treaty right fishing and from enacting other measures without first proving their necessity for conservation of the resource. The order prevented the State from using its arrest authority against fishcatchers carrying tribal identification and fishing under tribal regulations in usual and accustomed grounds and stations. It also recognized, as part of the treaty right, the authority of the tribes to manage their own fisheries without interference from the State, provided that preconditions establishing each tribe's ability to manage the resource were met.[80]

In addition to restricting the State's application of fishing regulations to the tribes, the order also required the State to assume an affirmative obligation to govern the fisheries in a manner that would assure Indians their fair share of the resource. The State was expected and required to restrict non-Indian fishing as necessary to assure Indians the return of their share of the fish resource to their usual and accustomed grounds and stations.[81]

The 1974 decision did not settle the matter of Indian fishing rights. It laid down the principles that, if followed, would have ended the controversy but, even so, would have required a forum to address specific issues as they arose in regulating a complex and dynamic resource.

In order to facilitate day-to-day determinations, Judge Boldt appointed Dr. Richard Whitney of the University of Washington to serve as chairman of a fisheries advisory board, composed of tribal and State representatives, to hold meetings on fishery management issues and to supply the evidence necessary for the court to make supplementary rulings.

The Reaction

To non-Indians who were told that their fishing opportunity would be cut back in order to allow Indians a substantial chance at the fish runs, and to the State regulators who were told that State law could no longer be used as a shield to mask the transfer of salmon and steelhead resources from Indian to non-Indian hands, the district court's opinion was anathema. The case was appealed by the State, but to no avail, because the Federal appeals court upheld the district court.[82] The case was then appealed to the United States Supreme Court, which denied review.[83] This meant that the district court's opinion was the final statement of the law to be applied.

Non-Indians were furious and the fury was directed at Judge Boldt personally. Despite affirmation of the decision by the appellate court, public animosity was aimed at this judge as if he, rather than any legal principle, were the foundation for the judgment in the case. The case was popularly renamed the "Boldt decision." Anti-Judge Boldt bumper stickers and anti-Boldt T-shirts, buttons, and other insignia of the new battle were in abundance.

Not so innocuous was the open defiance of the opinion by non-Indian fishcatchers. In response to the court's allocation of additional Indian fishing time to permit tribes to catch their rightful share of fish, protests were called for by non-Indian fishing groups.[84] Buoyed by cries that the decision constituted racial discrimination against them, the non-Indians took to the water on Indian fishing days.[85]

The matter took on an air of urgency in October 1976 when, after a sustained illegal fishery by non-

[78] *Id.* at 403, 404.
[79] *Id.*
[80] *Id.* at 413–19.
[81] *Id.* at 403.
[82] 520 F.2d 676 (9th Cir. 1975).
[83] 423 U.S. 1086 (1976).
[84] Philip Sutherland, interview in Seattle, Wash., Aug. 10, 1978.
[85] Ibid.

Indians, a non-Indian fishcatcher was shot by a State enforcement officer on the waters of Puget Sound.[86] In addition, there were allegations that fish buyers closed their facilities to Indians who were trying to sell fish caught on Indian days[87] and that non-Indians caught fish in closed waters and claimed they were taken in areas open to them.[88]

The open defiance of the Federal district court ruling went further. Non-Indians continued their protests to areas that were closed to all fishcatchers for the purpose of conserving the resource.[89] Scientists began to express concern that the major casualty of this "fish war" would be the fish resource itself. If this activity continued, there would be no more fish.[90] The situation was tense, destructive, and dangerous. The supplemental rulings of the court as fishing seasons progressed and the massive opposition to the court became a media event with all the excitement of play-by-play reporting to be seen in a sporting event.[91]

The protest was aimed largely at the Washington congressional delegation in the hope that its members would intercede in some way to reverse or nullify the effect of the ruling of the Federal district court. The non-Indian fishermen were apparently convinced that their cause was just and their legal interpretation of the treaties correct. Their theory was simply that the treaties recognized nothing more for Indians than a right to fish on an equal competitive basis with non-Indians.[92] There was also a determined effort to get the case before the U.S. Supreme Court, even though that Court had already declined to hear the matter. If that Court would only review the case, the thinking went, it would certainly reverse the lower court's decision.[93]

The Northwest Indian Fisheries Commission, the organization of treaty area representatives coordinating tribal efforts after the 1974 decision, clearly saw that illegal fishing was a tactic to force reevaluation of the treaty rights decision:

> Their tactic has become increasingly clear: create as much discord, lawlessness, and chaos as possible (so that the task force and Congress will feel a need to remedy the situation), attribute the problem to Indian treaty fishing rights, and then apply political pressure to induce Congress to resolve the matter at the expense of the group with the least political impact, the Indian Tribes.[94]

The tribal observation was painfully accurate. A mere 9 months after it was made, Washington's Senators signed a letter to the Secretary of the Interior that in relevant part said:

> As you know, the implementation of the so-called "Boldt Decision" has caused four years of conflict and controversy in Washington State. . .it has become impossible to provide adequate protection of the resource with present enforcement capabilities. . . .In 1976, illegal non-Indian fishing accounted for an estimated 34 percent of the total non-Indian catch in all of Puget Sound. . .adequate escapement levels necessary for the perpetuation of the resource are in jeopardy. . .while we work together for a long term solution, we must urge your very serious consideration of less than full implementation of the Boldt decision for this year.[95]

The letter was indicative of the approach of many non-Indians after the district court's decision was rendered. It blamed Judge Boldt for the woes of the non-Indian fishery, as if the court were responsible for the inability of some members of the oversized non-Indian fishing fleet to make an adequate living. The letter assumed Federal inability to enforce treaty law, but instead of suggesting either a greater enforcement effort or a Federal subsidy for affected non-Indian fishcatchers, the letter, in effect, said that illegal activity should be stopped via a payoff to the lawbreakers and that the amount should be assessed against the tribes.

[86] Wayne Williams, interview on Tulalip Reservation, Wash., Aug. 4, 1977.
[87] Forest Kinley, testimony, *Hearing Before the U.S. Commission on Civil Rights, Seattle, Washington*, Oct. 19-20, 1977, vol. I, p. 134 (hereafter cited as *Seattle Hearing*, vols. I and II); Jim McCay, vice chairman, Lummi Indian Tribe, interview in Marietta, Wash., Sept. 6, 1977; violations of treaty fishing rights summarized in Summary of Evidence Appearing of Record Re: Illegal Fishing and Washington Department of Fisheries Failure to Lawfully Regulate (filed Apr. 4, 1978), United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974).
[88] Reports of Indian fishery patrol officers in the Point No Point Treaty area of Puget Sound in the autumn of 1976 and 1977 indicated the presence of between 8 and 90 illegal non-Indian gillnet boats on at least 12 separate dates. Rod Marrom, interview in Kingston, Wash., Aug. 29, 1977; law enforcement records and joint technical report of the Point No Point Treaty Council and Washington Department of Fisheries, Oct. 13, 1977.
[89] Dayton L. Alverson, testimony, *Hearing Before the U.S. Commission on Civil Rights, Seattle, Washington*, Aug. 25, 1978, vol. III, p. 28 (hereafter cited as *Seattle Hearing*, vols. III and IV).
[90] See, e.g., numerous articles appearing between 1974 and 1979 in the *Seattle Times* and the *Post Intelligencer*.
[91] Philip Sutherland, Wallace Green, Archie Graham, testimony, *Seattle Hearing*, vol. III, pp. 85, 97, 105.
[92] Sutherland Testimony, ibid., p. 87.
[93] *Post Intelligencer*, Oct. 25, 1976, p. 1.
[94] "Tribal Report, vol. II," *Seattle Hearing*, vol. III, exhibit no. 3, p. 173.
[95] Henry M. Jackson and Warren G. Magnuson to Cecil Andrus, Aug. 4, 1978, *Seattle Hearing*, vol. IV, exhibit no. 4, pp. 6-7.

The strong negative reaction by non-Indian fishcatchers to the rulings of the Federal district court came from a sense that they had been wronged by it, as well as from the view that if it were implemented the decision would ruin them financially. The Puget Sound Gillnetters Association claimed that the total amount of time they were permitted to fish had been drastically reduced by the Boldt decision:

> On fish of Puget Sound origin, '74, '75, and '76, we had 16 days, and last year we had 7. So that's a total of 23 days of fishing opportunity in 4 years contrasting to a normal 2 and 3 days per week and 14 to 15 weeks, which would be 30 to 45 days each year. . .they have already, as far as I'm concerned, by physical coercion forced me out of my normal income pattern to the tune of some $60,000 in the 4 years.[96]

Similar negative economic effects were tied to the Boldt decision by the non-Indian purse seiners[97] and the charter boat owners.[98]

Non-Indian fishcatchers received support for their position from other arms of the Federal Government as well. In March 1975, a year after the district court's decision, the National Marine Fisheries Service issued a report called "The Economic Impact of the Boldt Decision." This agency of the U.S. Department of Commerce, which upon subsequent State default became a principal enforcer of the treaty rights decision, suggested that non-Indian fishing income was severely reduced due, in large part, to court decisions that transferred income from non-Indians to Indians.[99]

The report was viewed as sufficiently distorted in its conclusions and deficient in its analysis to warrant a critique from an Assistant Regional Solicitor of the Department of the Interior, who pointed out some of its obvious errors.[100] Despite the deserved criticism, the report was available to non-Indian fishcatchers as support for the argument that the Boldt decision had caused an economic crisis for them.

Despite the political public attack on the Boldt decision, those who were in a position to know were well aware that the tension among competing fishcatching groups, the environmental degradation, and the negative impact of overfishing on the resource were a product of the failure of the State to exert adequate management control. Even representatives of fishing groups, complaining about the effect of the Boldt decision upon them, admitted that there were other causes for their economic difficulties:

> [T]here were problems in the fishery prior to 1974—dams; lack of passage for fish; poor logging practices; poor road building practices; a mammoth Canadian troll fleet sitting up north that in the case of Puget Sound chinook salmon will take 70 percent of the total harvest, and in the case of the Columbia River they'll take upwards of 50 percent; the needs of man—and that might sound as a facetious statement, but it seems that, unfortunately, that anytime you have a battle of the welfare or the needs of fish versus the benefit needed for society, the fish lose.[101]

In 1963 a report was produced by fishery experts at the University of Washington in response to a request from the Governor's Fishery Advisory Committee and the Legislative Interim Committee on Fisheries.[102] It found, among other things, that the number of units of fishing gear could be reduced to two-thirds its then current size and still have the ability to harvest all salmon runs fully. Despite near record runs of the most valuable species, sockeye, earnings of three major gear types in Washington were severely depressed. The report also noted that any further increase in the numbers of fishing units or decreases in the size of the fish runs would cause economic losses to be even more severe.[103]

The report recommended license limitations, including a freeze on the issuance of new licenses and a program to buy back existing licenses and fishing vessels, in order to reduce economic competition to a point where the remaining fishcatchers could make a reasonable living in the industry.[104] Although sport fishing for salmon had a considerable effect on the economics of the fishery, the report said, there were inadequate data to determine the total impact accurately, because no licenses were required for sport salmon fishing. The report estimated, however, that

[96] Sutherland Testimony, *Seattle Hearing*, vol. III, pp. 83, 88.
[97] Ibid., p. 96.
[98] Edward Manary, testimony, ibid., p. 105.
[99] National Marine Fisheries Service, *The Economic Impact of the Boldt Decision*, by Jack Richards (Mar. 3, 1975), *Seattle Hearing*, vol. II, exhibit no. 27, pp. 460–93.
[100] George D. Dysart, Memorandum to Area Director, Bureau of Indian Affairs, Apr. 25, 1975 (Commission files).

[101] Manary Testimony, *Seattle Hearing*, vol. III, p. 107.
[102] William F. Royce and others, *Salmon Gear Limitation in Northern Washington Waters* (Seattle: University of Washington, 1963), p. v.
[103] Ibid., pp. v–vi.
[104] Ibid., pp. 118–19.

between 500,000 and 1 million fish were caught annually by sport fishcatchers[105] at a time when commercial salmon catches in the State were being reported averaging under 4 million fish.[106]

Despite the recommendations for limitation, statistics showed that "[F]leet size increased dramatically in all State-licensed gillnet and troll fisheries between 1965 and 1974. The increase in size ranged from 200 percent in the troll fleet to 500 percent in the Willapa Bay gill net fleet."[107] The huge increases in non-Indian licenses were probably more responsible for the adverse economic effect on the non-Indian fishcatchers than the Federal court decision on treaty rights. Even though Indians increased their share of the reported Washington salmon catch, by 1976 they still accounted for only 15 percent of fish caught, including their ceremonial and subsistence catches. Non-Indian sport fishing accounted for 26 percent of the reported catch, and the non-Indian troll fleet reported a 25 percent share. The non-Indian Puget Sound gillnet fleet reported 15 percent of the catch (not counting any illegal fishing), and the purse seiners 16 percent. Figures from the previous 2 years indicate that reduced catches among purse seiners and gillnetters were actually more attributable to increases in troll and sport catches than to tribal fishing.[108]

One of the authors of the 1963 report, 14 years after its issuance, lamented the failure of the State to adopt its recommendations to restore economic health to Washington fisheries through license limitation and controlled use of effective gear to harvest the resource:

> Nobody seems to have either the courage politically or the legislative technique to free the hands of a Department of Fisheries and then require it to deal effectively with the reordering of the way in which we harvest the fish. . .the framework makes no economic or biological sense at all. . . .[S]ince 1963. . .a program under which excessive gear at the salmon fishery might be reduced. . .has been available. . .yet it has sat there mildewing, as far as I can tell.[109]

High-level Washington State officials were also fully aware that faulty State management rather than treaty fishing rights was largely responsible for the poor economic condition of some of the fishcatchers in Washington State. For example, in a printed article, Donald Moos, former Washington State Director of Fisheries, admitted the State's dangerously slow progress in limiting the size of the fishing fleet. He described how the unrestrained competition among groups fishing with different types of gear has led to greater profits for some fisheries at the expense of others:

> By and large, uncontrolled catch transfer has been a passive thing; one fishery gains a political advantage or simply corks [intercepts fish headed for another], and gradually the catch shifts. It is, of course, a form of allocation, and from the manager's view has occurred from lack of rules or power to enforce rules about who has a right to catch what. The Boldt decision has had a similar effect, except it is enforced, conscious allocation; the only difference is that the transfer is obvious.[110]

The "obvious transfer" of fishing opportunity to Indians as a remedial measure, mischaracterized as discrimination against non-Indian fishcatchers, directed public attention to the racial aspect of a battle between Indian and non-Indian fishcatchers. Some State officials, including the State attorney general, supported non-Indian positions by emphasizing the conflict's racial aspects through characterizations of Indians as "supercitizens."[111] The vehement protests of non-Indian fishing groups concerning the "discrimination" against them caused by the Boldt decision were, in large measure, aimed at the wrong source. The allocation of fish to Indian tribes in recognition of the treaty rights was the latest and most visible blow to the economic well-being of non-Indian fishcatchers. The more devastating blows came from the failure of the State to regulate the resource in a way that would allow non-Indians to make a good living fishing a healthy resource.[112]

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[105] Ibid., p. 44.

[106] State of Washington, Department of Fisheries, *1975 Fisheries Statistical Report*, p. 26.

[107] J. Carl Mundt, *Report to the Regional Task Force of the Presidential Task Force on Northwest Fisheries Problems Concerning Catch, Licensing, Gear Reduction, and Allowable Fishing Time History for Washington Salmon Fisheries 1965–1977*, Nov. 3, 1977, p. 5.

[108] Ibid., exhibit no. 6, table of Washington salmon landings from Washington Department of Fisheries.

[109] James Crutchfield, "An Overview of the Fisheries: Their Use and Abuse and a Projection on Limitations," in *Fisheries in Puget Sound: Public Good and Private Interests*, Occasional Paper No. 9, ed. Manfred C. Vernon and James W. Scott (Bellingham, Wash.: Western Washington College, 1977), p. 11.

[110] Donald Moos, "The Fisheries Today: Assessing the Problems," in *Man, Government and the Sea: Northern Puget Sound and the Strait of Georgia*, Occasional Paper No. 5, ed. James W. Scott and Manfred C. Vernon (Bellingham, Wash.: Western Washington State College, 1976), p. 100.

[111] Slade Gorton, testimony, *Seattle Hearing*, vol. I, p. 14.

[112] Many fishcatchers from Washington derive significant portions of their

Although a moratorium on new fishing licenses was enacted by the State legislature in 1974[113] and a limited gear buy-back program was initiated in 1975,[114] these moves were too little and too late for a situation that had gotten out of hand. The political pressure generated by non-Indians was sufficient to get the Washington congressional delegation to advocate an alternative to implementation of the Boldt decision.

Federal Task Force

The Washington congressional delegation responded to the clamor of the non-Indian protest against Federal judicial authority by viewing the situation as a crisis requiring a firm Federal reaction. At this point in early 1977, with the case decided and upheld on appeal, an approach could have been to send agents of the Federal Government to the Northwest to enforce the district court's orders. Any necessary enabling legislation and subsequent regulations could have been sought to authorize Federal agents to enforce the law if the State failed or refused to do so, and the unlawful fishing might have ended.

Strict enforcement of the decision, however, was not the approach chosen. Instead, the Federal Task Force on Washington State Fisheries was appointed by President Carter on April 7, 1977, at the request of the Washington congressional delegation, and suddenly there was a new player in the drama.[115] The members of the task force, namely the Secretary of the Interior, the Secretary of Commerce, and the Attorney General, had the authority and power of the executive branch at their command, but there were no initial indications as to how the power would be used. Their responsibilities were delegated to high-level Federal administrators within those departments in Washington, D.C.[116] Authority was then subdelegated to the working arm of the task force, which was a regional team of Federal officials in Washington State.[117]

The departments involved in the task force were already playing important roles with respect to the fisheries of the Northwest.[118] James Waldo, an assistant U.S. attorney from Seattle, served as chief negotiator and senior staff person for the regional team.[119] The role of the regional team was not defined well to the public, and the team itself was given very little guidance on the nature of its mission or how to go about it, with the exception of four guiding principles established by the Federal task force:[120]

1. The optimum utilization of the fisheries resource, including Federal assistance for fisheries enhancement.
2. A healthy commercial and sport fishery that will provide an opportunity for all who depend upon salmon fishing for their livelihood to earn a good living.
3. A utilization of the fishery consistent with recognized treaty fishing rights reserved under the Stevens Treaties of 1854 and 1855.
4. Development of management systems that will ensure that the salmon fishery is preserved and developed so as to satisfy points 1 through 3.[121]

The approach of the members of the regional team to the dispute that they were to address was that there were two groups of fishcatchers, Indians and non-Indians, each with a strong claim of equity on its side. Mr. Waldo stated his view of these arguments:

> Let's say on the treaty side they signed a contract. The contract says, "We give you clear title to all this land except what we reserve for

resources from fisheries in and around Alaska, California, and Oregon. The extent to which any diminished return from Washington waters affects the overall income of these mobile fishcatchers varies greatly based on their ability to fish alternative sources.

[113] Rev. Code Wash. Ann. §§75.28.450–485 (Supp. 1980–81).

[114] Rev. Code Wash. Ann. §§75.28.500–540 (Supp. 1980–81).

[115] Regional Team of the Federal Task Force on Washington State Fisheries, "Settlement Plan for Washington State Salmon and Steelhead Fisheries," *Seattle Hearing*, vol. IV, exhibit no. 6, pp. 34, 37 (hereafter cited as "Settlement Plan").

[116] Anne Wexler, Deputy Under Secretary for Regional Affairs, Department of Commerce; Leo Krulitz, Solicitor, Department of the Interior; James Moorman, Assistant Attorney General, Land and Natural Resources Division, Department of Justice; Forrest Gerrard, Assistant Secretary for Indian Affairs, Department of the Interior; and Richard Frank, Administrator, National Oceanic and Atmospheric Administration, Department of Commerce. "Settlement Plan," p. 29.

[117] The members of the regional team were: John C. Merkel, United States Attorney and chairman of the regional team; Dayton L. Alverson, Director, Northwest and Alaska Fisheries Center, National Marine Fisheries Service, Department of Commerce; and John D. Hough, Director, Western Field Offices, Department of the Interior. Ibid.

[118] The Department of Commerce, through its National Marine Fisheries Service, is responsible for enforcing U.S. fishing regulations in the 3- to 200-mile zone and for commercial fishery development. The Department of the Interior has an ongoing interest in protecting the resource through the authority of its Fish and Wildlife Service. Interior also is the primary United States agency for implementation of the Federal trust responsibility toward Indian tribes, which is carried out by the Bureau of Indian Affairs under the Assistant Secretary for Indian Affairs. The Department of Justice, as the Government's litigator, has been directly involved in the cases that have judicially acknowledged the treaty rights to fish in Washington State waters.

[119] James Waldo, testimony, *Seattle Hearing*, vol. III, p. 5.

[120] Leo Krulitz and James Moorman, testimony, *Hearing Before the U.S. Commission on Civil Rights, Washington, D.C.*, Mar. 19–20, 1979 (hereafter cited as *Washington, D.C. Hearing*).

[121] "Settlement Plan," *Seattle Hearing*, vol. IV, p. 30.

reservation, in return for which we want to retain certain things, particularly fishing." For 100 years or more. . .there was very little done to substantiate that claim. And then they go through the court system, as we're supposed to do in this country, and they establish what that right means. . . .

The decision comes out and the tribes say, "Okay, it is now final and has been supported by the ninth circuit. *Cert,* [review] has been denied by the Supreme Court, we've established our rights, and we'd like to have them fulfilled."

I think as an advocate attorney I could make a good case on that side. . . .On the other side, you have people who. . .want to fish and don't want to be warehouse employees or anything else. They want to fish. . . .There are instances in which people have told us that, "When I got into this business back in the forties or fifties, there were questions about these Indian treaty fishing rights, and I'd ask people in government who were supposed to know, 'What do these things mean?' and 'No, it doesn't mean anything.' That was back 100 years ago and it just meant that they could fish like you could."

Based, in a sense, on what you might almost call detrimental reliance on what the governmental officials were telling them, these people committed their life to being fishermen. . . . The Federal Government as well as the State is encouraging them to get into fisheries.

So. . .the non-Indian fishermen say, "Look. . .[o]ne generation of fishermen are bearing the brunt of something that was designed to benefit everyone. We knew nothing about it when we got into this business, and is that fair? We don't have the benefit to the land title. It may be a benefit to the government and citizenry as a whole, but to us it's of no particular benefit."

I think, again as an advocate, I wouldn't mind having that side of the case either.[122]

The regional team could view both fishing groups as having good arguments, because its view of how the conflict got to this stage was that it resulted not through the fault of either, but from the differing views of the State and Federal governments. The treaty tribes always said they had a right to catch fish, while the State, representing the non-Indian viewpoint, held the view that the treaties gave the tribes nothing more than a right of access to their fishing places with no guarantee that enough fish would return to permit fishing at those places. The State regulated the fisheries without regard to any special Indian rights, and the Federal Government was "willing to let that ride,"[123] unwilling to challenge the State's view on behalf of the Indian tribes for more than 80 years.[124]

With these viewpoints in mind, the regional team set out to find a solution to the controversy that would be a "fair and equitable settlement for each of the participants in this fishery."[125] According to the regional team's own view, its objective was "to devise a new set of arrangements under which the principal concerns of each of the parties could be accommodated."[126]

What the regional team was trying to do is much clearer in retrospect than it was during its life. There was no clear initial statement of authority for the task force or its regional team. None of the entities involved in the dispute knew whether the regional team would act in some way to affect the ongoing daily dispute being litigated in Federal and State courts, or whether it would play an advisory role. When the regional team was created, for example, Mr. Waldo was the primary trial attorney for the United States, representing the tribal interest in the case. Mr. Waldo played the apparently contradictory roles of partisan attorney and impartial negotiator for about 3 months, until his role as litigator was given to another attorney. Simultaneous pursuits of these functions, when added to the U.S. legal position as trustee for the tribes, made non-Indians very skeptical about the task force.[127] The lack of definition of Mr. Waldo's new role, and the extent to which it included a continuing duty to uphold tribal interests inside or outside the courtroom, was not clear to either the tribes or the non-Indian fishing groups and, in fact, may have been the cause for a request by non-Indians to the President that Mr. Waldo be removed from his position with the task force.[128]

Beyond the confusion over Mr. Waldo personally, the authority or power of the regional team to have any effect on the continuing dispute was never clear.

[122] Waldo testimony, *Seattle Hearing,* vol. III, pp. 9–10.
[123] Ibid.
[124] Ibid., p. 9.
[125] John Merkel, Lee Alverson, and John Hough, written testimony, *Seattle Hearing,* vol. III, exhibit no. 2, p. 157.
[126] Ibid., p. 145.
[127] Waldo Testimony, ibid., pp. 16–17.
[128] Ibid.

According to Mr. Waldo, the groups dealing with the regional team were not sure that it was in their interest to have anything to do with it: "We were always being second guessed as to whether anybody in the executive branch would even read our report, much less do anything about it."[129]

The effort of the team, in its collective view, was different in kind from the responsibility of the United States as a trustee of tribal interests. While working on the regional team, the members and staff did not feel bound to act in any representative, fiduciary, or advocate role for the tribes. Instead, they viewed their roles as catalysts to promote a settlement that in their view would be fair to all parties.[130]

It was not at all clear to the tribes, however, that the regional team of the task force was acting in a capacity outside the traditional responsibility that the Federal Government has as a trustee of tribal interests. An attorney who represented the tribes in their negotiations with the regional team said: "Initially it was my understanding that they would be a Presidential task force operating under the duty the executive has pursuant to the trust responsibility."[131]

It appears that neither the Indian tribes nor the non-Indian fishing groups had the same understanding as the regional team concerning its mission and its constraints. For example, the third guideline of the task force required that the regional team work toward a "utilization of the fishery consistent with recognized treaty fishing rights reserved under the Stevens Treaties of 1854 and 1855."[132] The tribes thought that this provision required the regional team "to deal fairly with the problems that the tribes were having with *implementation* [emphasis added] on the decision, and that they would work towards implementation of the decision in such a way as to deal with some of these other problems."[133]

Indeed, the non-Indian fishcatchers also believed that the regional team was hamstrung by the guidelines into a position of having to negotiate the implementation of the court decision.[134] A representative of non-Indian commercial fishcatchers said: "I think they were making a sincere effort to try and have some type of solution, but they were actually making an effort with their hands tied because of the guidelines."[135]

The regional team, however, thought that it had a wider range of options. Its members did not believe they had to view the decision and orders of the district court as the starting point for their work. Instead, the team members thought they could propose alterations to the court's decision, as they deemed necessary, in order to facilitate negotiations. The task was begun, however, with the idea that the goal would be a settlement that would differ somewhat from the court's decision, but that would also be agreed upon by the tribes, non-Indian fishcatchers, the State of Washington, and the Federal Government. As Mr. Merkel, the U.S. attorney, expressed it:

> You can't negotiate a court case after the case has been decided without somebody giving up something that he won in the court decision.
>
> So, you enter into this negotiation knowing full well that the law is this way and this way and that you've got to make some movement in there, that the law has got to be changed. If nobody wanted to change the law, and nobody wanted to change the rights that are involved, there would be no necessity whatsoever to do any negotiations.
>
> If the Federal Government and the task force started out saying, "All right, we're going to sit down and figure out a way to negotiate full implementation of the Boldt decision," there would have been nobody else sitting down with us. That was very obvious that the point of this was to try and negotiate with all the parties and see if you couldn't come up with a better economic condition for everybody by making some adjustments in the decision that the court came to.[136]

Dr. Alverson, the Commerce Department representative, saw the regional team effort in a similar vein:

> The Government perceived that even though it was attempting to enforce, essentially, a decision of the court, that a large part of society in this area was not accepting it, and it was not leading to provide the benefits to the minority groups that they sought.

[129] Ibid., p. 23.
[130] Ibid., pp. 17–18; Merkel and Alverson Testimony, p. 27; Hough Testimony, p. 30.
[131] Mason Morisset, testimony, ibid., p. 70.
[132] "Settlement Plan," *Seattle Hearing*, vol. IV, p. 30.
[133] Morisset Testimony, *Seattle Hearing*, vol. III, p. 70.
[134] Sutherland Testimony, ibid., pp. 86–87.
[135] Green Testimony, ibid., p. 93. A similar view was expressed by the State Sportsman's Council, Graham Testimony, ibid., p. 109.
[136] Merkel Testimony, ibid., pp. 40–41.

> Now, there are a number of ways you can resolve this, and I agree you can develop a large enforcement capability and rush in and, essentially, put your thumb on these people and force them through a very large enforcement activity to respond to this.
>
> There is another alternative in, essentially, bringing a group of people together and asking the people who have the right if there is a different way to exercise that right which will help to resolve the problem that faces the other body.[137]

In fact, the final solution proposed by the regional team was not an attempt to implement the court decision, but rather an attempt to replace the guarantees of the treaties, as determined by the court, with a completely different fishery management and distribution scheme. As it turned out, it was critical that the tribes not be made aware that the regional team was prepared to consider what in practice would amount to altering the terms of the court's decision. Three of the five treaty representatives to the Northwest Indian Fisheries Commission were asked whether they would have cooperated with the task force, knowing that it might recommend diminishment of their court-adjudicated rights. They responded that they would not have participated in discussions with the regional team had they realized the result could in any way diminish their hard-won and long-awaited judicial victory.[138]

A task force member at the Washington, D.C., level viewed the regional effort to produce a settlement after, rather than before, a final court decision as justified by the continuing authority over day-to-day fisheries management that the Federal court had to exercise after its 1974 decision. Thus, even though the court's decision was final as a matter of law, the case was not closed because the litigation, like the fishery, is ongoing.[139]

Furthermore, the effort to reach a settlement was seen by at least two members of the Federal task force as an appropriate way for the United States to live up to its trust responsibility, even if the tribes did not like the solution proposed, because in their view it would be in the long term interest of the tribes to have the matter settled.[140]

Regional Team Process

The task force maintains that it began its work with no preconceptions about the final result of its efforts. The only major requirement placed on the regional team beyond the four guidelines mentioned previously was "to start essentially with no preconceived plan and simply approach all of the participants and say, 'What do you think the problems are and what do you think the solutions are?' and go from there within the context of trying to meet the four guidelines."[141]

There was, however, at least the knowledge on the part of the task force that there was strong political pressure to get certain provisions into the final plan. One of those, which was expressed in a congressional meeting in Washington, D.C., just before the task force was formed and which found its way into the proposal of the regional team over a year later, was the decommercialization of steelhead:

> The first goal is to eliminate the competition between Indians and sports fishermen for steelhead. A trade off of salmon for steelhead with a corresponding enhancement of the salmon runs is the most probable solution.[142]

Although some provisions of the regional team's proposal may have been earmarked for inclusion from the beginning of the task force effort, most of the provisions seemed to have been generated by a significant investment of time and resources by the tribal, State, and Federal governments and to some extent the fishery groups to be affected.

The regional team began its work by putting together a technical staff and holding meetings with the State, the tribes, and the non-Indians in May 1977.[143] An initial decision was that the tribes and non-Indian fishing groups should be seen separately and given an opportunity to tell the members of the regional team the problems they saw and the ideas they had about solving them.[144]

[137] Alverson Testimony, ibid., p. 44.
[138] Forrest Kinley, Guy McMinds, Billy Frank, testimony, ibid., pp. 113–14.
[139] Krulitz Testimony, *Washington, D.C. Hearing*, vol. I, p. 199.
[140] Krulitz and Moorman Testimony, ibid., pp. 194–95.
[141] Waldo Testimony, *Seattle Hearing*, vol. III, p. 11.
[142] James R. Fielding, Chief, Legislative Services, Fish and Wildlife Service, U.S. Department of the Interior, memorandum to Assistant Secretary for Fish and Wildlife and Parks, Mar. 18, 1977 (Commission files).
[143] Waldo Testimony, *Seattle Hearing*, vol. III, p. 12.
[144] Ibid., pp. 12, 14.

The regional team believed that face-to-face discussions would not initially be productive because the sides were so far apart.[145] Separate meetings also gave the regional team added control in the process because only its members knew what all factions had to say and how flexible they would be about a given issue.

Much of the early work of the staff of the regional team addressed technical problems. A seminal problem was the objection of all fishing groups to using the State's data base. The lack of confidence in the State's figures required a major effort that resulted in a computerized data system.[146] Another point, realized by the regional team early in the process, was that the total fishing effort was too large for the resource and would have to be reduced.[147] Another necessary step was to determine the possibilities for enhancement of the resource, i.e., taking measures to increase the fish supply, including artificial propagation and habitat improvement. Enhancement, however, was one thing superficially and another when explored in depth:

> I think it was . . . clear that . . . enhancement . . . was not a panacea. Unfortunately, many of the people and public officials looked at it as a panacea. The more you got into it the more you realized that there were substantial disagreements between the biologists.[148]

To better understand the problems and possibilities of enhancement, a technical team, consisting of a biologist representing each of the State departments, two persons from the tribes, one each from the sport and commercial fishing groups, and several from the Federal Government, was assembled. They put together technical standards and developed enhancement proposals that later became a major component of the plan.[149]

As the work of the regional team progressed in the summer of 1977, an unexpected change was made in its method. The Federal Government, in its role as litigator in day-to-day fishing matters in the Federal district court, made a unilateral decision to request reduction in the court-ordered Indian share of two particular fish runs. It was originally proposed to the tribes that they accept a 5 percent reduction in their 50 percent share of coho and chum salmon headed for south Puget Sound. Apparently this was, at least in part, an effort to gain credibility with the non-Indian fishing groups and to show all sides that the task force had some clout. The tribes would not agree to reduce their court-determined share voluntarily, but the Government, with the approval of the Federal task force in Washington, chose to take the proposal into Federal court anyway.[150] With very little advance notice, the regional team told the tribes that it would request a one-time reduction in the tribal shares of the two salmon runs in order to "minimize otherwise severe economic impacts upon commercial fishermen."[151]

The tribes protested vehemently, feeling that the United States had betrayed them as trustee of their interests and that the regional team had changed character from an intermediary seeking voluntary agreements among the parties to a new adversary. In an angry letter to the Solicitor for the Department of the Interior, the requested reduction of the Indian share was characterized by a tribal representative as undermining the Boldt decision, "depriving tribes further of their treaty and economic rights, and sacrificing the welfare and escapement needs of the salmon resources of Puget Sound."[152] A similar letter was sent to President Carter that expressed the additional concern that the Federal Government was distorting the facts of the matter.[153]

The salmon runs at issue were those headed toward the fishing areas of small Puget Sound tribes that were last in the line of fisheries on these species. The economic effect of the 5 percent reduction on these tribes was expected to be greater than any benefit to be derived by non-Indians, because the tribes' fishing opportunities were already severely limited by prior intercepting fisheries. These were tribes "who thus far have not received any appreciable salmon harvest in 1977."[154]

To the tribes, it also seemed that if the real purpose of the Federal Government was to alleviate economic hardship of non-Indian fishcatchers, it could have done so without requiring tribes to pay for it. This view, as well as a demand for clarifica-

[145] Ibid., p. 14.
[146] Ibid., pp. 13-14.
[147] Ibid., p. 15.
[148] Ibid.
[149] Ibid., p. 16.
[150] Ibid., p. 18.
[151] Telegram from regional team to Calvin Peters, Squaxin Island Tribal Counsel (Aug. 24, 1977); statement of Mike Thorp on behalf of the Department of the Interior before Judge Boldt in United States v. Washington, 384 F. Supp. 312 (Aug. 30, 1977).
[152] Bill Frank, Jr., to Leo Krulitz, Aug. 27, 1977 (Commission files).
[153] Bill Frank, Jr., to the President of the United States, Sept. 2, 1977 (Commission files).
[154] Ibid.

tion of the role of the task force and another for assurances that the task force was really not out to abrogate treaty rights, was expressed to task force members in Washington, D.C.[155]

It is important to note that at no time prior to this was there any indication to the parties that the regional team would infuse its work into the ongoing enforcement and allocation matters still being litigated before the Federal district court, and the surprise to the tribes infuriated them to a point of refusing to deal with the regional team for a time.[156] The benefits to the regional team apparently did not outweigh the loss of tribal cooperation, because the non-Indians also viewed this maneuver skeptically. Some believed that a 5 percent reduction in the Indian share, from 50 percent to 45 percent of two particular fish runs, was all they could expect to gain from the entire task force process,[157] and others that any allocation of fish between Indians and non-Indians was both unfair and legally wrong.[158]

The decision to seek a diminished share of fish for tribes by going to court was viewed by tribal leaders as an example of overt pressure on the tribes by the Federal task force and its regional team. There were also allegations that the Washington congressional delegation, the task force, and the regional team had used their authority to threaten the tribes in other areas of intergovernmental contact if they failed to cooperate in the conciliation process. Leaders of the Lummi and Nisqually Tribes said their tribes had been threatened with the prospect of Federal fund cutbacks or other adverse congressional action if they did not cooperate with task force efforts.[159] Threatening legislation actually was introduced in the Congress. One of the more extreme legislative measures proposed was a bill introduced by Congressman John E. Cunningham (R-Wash.).[160] Deceptively titled "Washington State Fishing and Hunting Equal Rights Act of 1977," the bill would simply have eliminated treaty fishing rights by subjecting all Indians to Washington State hunting and fishing laws, regardless of any treaty provisions to the contrary. Two other bills were introduced by the same Congressman. One, called the "Steelhead Trout Protection Act,"[161] would have done the same thing but would only have applied to steelhead, and another bill, entitled the "Native Americans Equal Opportunity Act,"[162] would have accomplished the same result by requiring the President to abrogate all United States treaties with Indian tribes.

Though these particular measures were not given much chance of passage due to the extreme reversals of Federal policy they proposed, there were more serious attempts in Congress emanating from Washington State at this time to limit or eliminate tribal rights on a national scale.[163] In addition, as the regional team's efforts were proceeding, Senator Warren Magnuson (D-Wash.) wrote to Interior Secretary Andrus asking for a detailed breakdown of Federal expenditures related to the Boldt decision.[164] Although the purpose of the request was not stated in the letter, it was viewed by tribal representatives as a threat to continuation of Federal funds allocated to the implementation of the Boldt decision.[165]

Despite these actions, which influential tribal leaders viewed as coercive, they could not risk withdrawing from the regional team effort. They renewed their participation in the project in November 1977, submitting a 651-page series of reports to the team detailing the data, positions, suggestions, and recommendations of the tribes within the case area.[166] A second round of discussions between the parties and the regional team consumed November and early December 1977 during which proposals were discussed, and in January the regional team published its first draft of a settlement plan.[167]

The tribes had incurred considerable expense of time and money in producing their written submission to the regional team as well as in cooperating with and reacting to the initiatives of the team. The director of the Lummi Fisheries Program, for example, testified that his duties were seriously interrupted by the need to spend significant periods of time monitoring and providing input to the regional team effort.[168] The executive director of the

[155] Bill Frank, Jr., letter to Leo Krulitz, Jim Moorman, Anne Wexler, and Forrest Gerard, Sept. 20, 1977 (Commission files).
[156] James Heckman and Mason Morisset, testimony, *Seattle Hearing*, vol. III, pp. 67, 68.
[157] Waldo Testimony, ibid., p. 18.
[158] Sutherland Testimony, ibid., p. 87.
[159] Forrest Kinley, testimony, *Seattle Hearing*, vol. I, p. 129; Bill Frank, Jr., testimony, *Seattle Hearing*, vol. III, p. 117-18; Sam Cagey, interview on Lummi Reservation, July 29, 1977.
[160] H.R. 9175, 95th Cong., 1st sess. (1977).
[161] H.R. 9736, 95th Cong., 1st sess. (1977).
[162] H.R. 9054, 95th Cong., 1st sess. (1977).
[163] See discussion of Congressman Meeds' bills in section on jurisdiction, chapter 5.
[164] Warren Magnuson to Cecil Andrus, Mar. 3, 1978, exhibit no. 4, *Seattle Hearing*, vol. IV, p. 1.
[165] Morisset Testimony, *Seattle Hearing*, vol. III, p. 74-75.
[166] Heckman Testimony, ibid., p. 68.
[167] Waldo Testimony, ibid., p. 19.
[168] Kinley Testimony, ibid., p. 113-14, 123.

Northwest Indian Fisheries Commission expressed a similar view of the drain on tribal resources resulting from necessary interaction with the regional team.[169]

There was considerable shock among the tribes, who felt that their efforts and proposals had either been ignored or drastically changed, to the detriment of the tribes, by the regional team in the January proposal.[170] For example, an alternative fish management system suggested by some of the tribes would have coordinated tribal and State management. It would have done so, however, without sacrificing the federally-recognized, independent governmental authority of individual tribes to manage the resource and their fishcatchers, as was ultimately suggested by the regional team.[171]

The tribes were not the only disappointed bargaining group. At least some dissatisfaction was expressed by all factions in their responses to the January draft settlement plan. The non-Indian fishing groups, with the notable exception of the Puget Sound Gillnetters, put aside their own intergroup differences to form a Commercial-Recreational Fisheries Delegation for the purpose of reacting to the draft settlement plan and to unite their efforts in seeking alternatives.[172]

The State government also took issue with many points in the draft settlement plan, although it determined that the draft contained "a number of excellent ideas which will significantly improve the condition of the salmon resource in Washington."[173] The State went on, however, to recommend modifications to the draft that would strengthen State control over the fisheries,[174] reduce opportunities for Federal intervention in the event of continued abuses by the State,[175] and clearly eliminate all the legitimate management rights and judicial authority of individual tribes as governments in favor of a centralized system,[176] among other things. In other words, the State was suggesting that its hegemony over fisheries, which was reduced by a Federal court due to State abuses of power, be effectively reestablished through the vehicle of a settlement plan.

After the January plan was issued, the tribes, State, and non-Indian fishing groups thought they might be able to resolve some of their differences in face-to-face negotiations. The regional team expressed a willingness to allow an opportunity for such negotiations and to incorporate agreements reached in the final version of the settlement plan.[177]

The tribes chose a single negotiator, as did the State, and talks began. The Commercial-Recreational Fisheries Delegation joined the talks at a later date and agreed to have the State negotiator represent its positions.[178]

Negotiations continued from shortly after the issuance of the draft plan until approximately June 1978. During this period the negotiating teams reached tentative "agreements" on enforcement and resource enhancement that were incorporated into the final version of the regional team's settlement plan, which it issued in June 1978. These "agreements" were a matter of dispute, however, as the tribes claimed that these were only tentative draft agreements of technical committees that were misrepresented as final agreements. The tribes did not consider them final agreements because they had not been ratified by the tribes.[179]

The final draft of the settlement plan offered by the regional team in June 1978 contained most of the provisions originally posed in the January draft, although several clarifications and a few changes were made in the final version. After issuing its report, the regional team of the Federal task force ceased to exist, and its members and staff returned to their normal functions.

The Settlement Plan

The Settlement Plan for Washington State Salmon and Steelhead Fisheries is the final product of the efforts of the regional team. It is about 350 pages in length and is reproduced in the printed record of exhibits received by the Commission on Civil Rights at its hearing in Seattle in August 1978.[180]

[169] Heckman Testimony, ibid., p. 69.
[170] Heckman and Kinley Testimony, ibid., pp. 69, 123.
[171] *Tribal Report*, vol. III, ibid., pp. 180–223. See subsection entitled "Settlement Plan" for a full analysis of the proposal of the regional team of the Federal task force.
[172] Manary Testimony, *Seattle Hearing*, vol. III, p. 108.
[173] State of Washington, Department of Fisheries, *Comments on Proposed Settlement for Washington State Salmon and Steelhead Fisheries* (Feb. 15, 1978), p. 5 (Commission files).
[174] Ibid., p. 6.
[175] Ibid., p. 24.
[176] Ibid., p. 40.
[177] Waldo Testimony, *Seattle Hearing*, vol. III, p. 19; Heckman Testimony, p. 69.
[178] Manary Testimony, ibid., pp. 108–09.
[179] Heckman Testimony, ibid., pp. 69–70; Johnson, testimony, p. 78.
[180] "Settlement Plan," *Seattle Hearing*, vol. IV, p. 27.

Fundamental Premises

It is easiest to understand the end result of the efforts of the Federal regional team with a look at the premises upon which it was based. First, the task force came into being in 1977, 3 years after the Federal district court had ruled exhaustively on Indian treaty right fishing in Washington State and a year after the U.S. Supreme Court had made the decision final by denying further appellate review. Though the law had been decided, the dispute was far from being settled as massive resistance among non-Indian commercial fishcatchers created a confrontational crisis with State law enforcement officers on the waters of Puget Sound. The non-Indians of the State were refusing to accept the decision, and the State seemed unable or unwilling to stop illegal fishing. The resource was being damaged. State effort at enforcement was minimal. The establishment of a Federal task force was viewed by many participants as at least tacit recognition of the massive resistance to the decision by the State and the private interests involved. In a sense, the illegal behavior had borne fruit.

The task force and its regional team were created at the behest of a powerful congressional delegation that was being pressured by non-Indians to do something about an adverse court decision. The task force and its regional team knew that whatever they chose to do would be subjected to political scrutiny rather than judicial review.

As evidenced by the testimony of its drafters, the plan was a political document, designed to accommodate all those claiming rights or interests in the fishery in such a way as to ease tension on the resource and among those groups.[181] Thus, the approach to drafting the document had to include considerations of what would be politically acceptable. The views of those factions that looked politically strong enough to object successfully to implementation of the plan were supported in the plan to the extent the regional team thought necessary to keep them from seeking to destroy it completely.

This basic political problem accounts for many of the ideas finally adopted in the plan. The political weakness of the tribes,[182] in relation to the other combatants involved, was a factor incorporated into the judgments of the regional team members. To follow the course of what was politically possible in their view, the team decided that the rights won by the tribes in court had to be considered negotiable. In fact, the plan sought to dismantle and rearrange adjudicated tribal rights into what the team viewed as a politically acceptable form in order to produce an effective document.

The regional team did not have the power to decide what was right and to order it carried out. The team had only the power to persuade the parties to agree to changes and compromises and, failing that, to promote a solution that it thought the ultimate deciders, i.e., Congress and the executive branch, would invest in politically. A major premise supporting creation of the task force was the view that the Federal court decision could not be enforced: "Well, I think the United States in the last 3 years. . .has done most everything it could within its power to enforce that court decision."[183]

Actually, given the power of the Federal Government, it may be more appropriate to say that the Federal Government would not go to any length that might be necessary to enforce the decision. The difference between these expressions is pertinent because there are many more alternatives available to the Government in dealing with a court decision not popularly accepted, as opposed to the choices it has in facing a situation it really lacks sufficient power to enforce. The conscious choice of creating a task force is a political decision of preference, and any solution proposed by it is similarly a matter of political preference in place of strict enforcement of the law.

The planning proceeded on the presumption that each and every fishing group should be permitted to continue its interest in the fishery. This included grouping by gear type such as trollers, gillnetters, purse seiners, as well as the classifications of Indian and non-Indian. The distribution plan to be recommended was based on a consideration that a fair share of the resource should be provided to each of these groups.[184] For this purpose, Indian tribes were considered one of these groups that, unlike the others, had some special Federal treaty rights. Although these treaty rights could not be ignored, the regional team decided that they could be converted to completely different concepts, promises, or cash as long as the trade off seemed "fair" to

[181] Alverson Testimony, *Seattle Hearing*, vol. III, p. 34–35.

[182] Tribes account for less than 1 percent of the population of the State. U.S., Department of Commerce, Bureau of the Census, *Characteristics of the Population*, 1970 Census of Population, vol. 1, part 49, p. 41.

[183] Waldo Testimony, *Seattle Hearing*, vol. III, p. 21.

[184] "Settlement Plan," *Seattle Hearing*, vol. IV, pp. 61–62.

the regional team members. The Federal judiciary's determinations as to the meaning of the treaty provisions could be put aside if some substitute for them could be found that would work better in the overall plan being developed. As evidenced by the provisions of the plan itself, the Federal court decision determining treaty rights was not used as a premise from which to begin planning, as both Indians and non-Indians thought it would be, but rather as an alterable set of elements to be considered in drafting the proposal. Given this view of the law and its mission, the regional team sought to justify the drastic changes it was suggesting for Indian treaty right fishing.

Provisions

The proposed final settlement plan claimed, by its language, to be a proposal separate from treaty rights and separate from the decision of the Federal court. It proposed that Indian tribes refrain from exercising certain treaty rights rather than relinquish those rights.[185] Given the extent of the physical changes in fisheries proposed by the plan, however, it is unlikely that, if it is adopted, the technical distinction of wording would be taken seriously, allowing the tribes to go back to the way things were under the Federal court decision if they did not like the new terms once those terms became operative. This discussion of the plan's provisions will therefore be expressed in terms of the actual changes that it would make in both treaty rights and the Federal court's decisions regarding them.

A major change proposed by the plan is in the management of the resource. Prior to Federal court rulings, the State had exerted its authority to control all fishing for salmon and steelhead within its borders, including Indian fishing. The case of *U.S. v. Washington* added significantly to previous Federal court decisions that had imposed some restrictions on the State's assumption of authority to regulate Federal treaty rights. After the decision, the tribes were recognized as having authority to regulate their fishcatchers, not only on reservation but also at their usual and accustomed fishing grounds off reservation, free from State regulations and enforcement agencies that had previously succeeded in rendering the off-reservation rights meaningless.

The usual and accustomed off-reservation fishing grounds are based on the historical fishing patterns of each tribe. Consequently, they vary considerably from tribe to tribe. Under the Federal court decision, each tribe's jurisdiction follows its fishcatchers into these waters.

The State has management jurisdiction outside the reservations over nontreaty fishing and over Indians fishing outside their tribe's usual and accustomed grounds. In a sense, the jurisdictional scheme today is a mixture of geographic location and, more important, the status of the person.

The plan would clearly eliminate these off-reservation usual and accustomed grounds.[186] In their place, the plan would superimpose a two-zone concept of jurisdictional control over the geographic area of the fishing run. The Tribal Commercial Management Zone (TCMZ) for the duration of the settlement would replace the treaty concept of "usual and accustomed" for individual tribes and assign a noncontiguous area to the tribes collectively for multitribal management. The TCMZ would be smaller than the sum of all the "usual and accustomed areas" and made up primarily of reservation areas, nearby river mouths, or coastal areas. The State Commercial Management Zone (SCMZ) would consist of those areas not included in the TCMZ, the areas in which the majority of the fishing has occurred in recent years. The significance of this change is not in a restriction of the areas in which Indians may fish, since Indians would be able to fish in the SCMZ. The crucial difference is that *anyone* fishing in the SCMZ would be subject to State regulatory control. The loss of tribal regulatory control over tribal members in those parts of the SCMZ that have been judicially determined to be tribal usual and accustomed fishing grounds would constitute a major change from the litigated right.

Management

The settlement plan places jurisdiction over the resource in three managing agencies: the Washington Department of Fisheries (WDF), the Washington Department of Game (WDG), and a Tribal Commission (TC).[187] The process of managing the

[185] Ibid., p. 59.
[186] Ibid.
[187] Separate management authority is given to the Quinault Tribe for the Quinault, Queets, and Raft River watersheds, similar to but apart from the Tribal Commission. It is also noted that the Quinault Tribe is expected to "forgo" its possible treaty fishing rights claims to the Columbia River and Willapa Bay areas. Ibid., p. 105.

resource and fishing effort would be a coordinated function.

Under the plan, disputes among the three management agencies about proposed plans or regulations would be settled through a process of incorporating the advice from the joint technical committee, the assistance of a third party in the case of predictive models and preseason regulations, and mediation by a Fisheries Review Board. In the event that the managing agencies failed to reach agreement in either of these three areas, the agency with the authority to promulgate models or regulations would have the final say, short of a finding of conservation emergency or substantial noncompliance with the settlement plan (see later section on compliance protection). Thus, subject to the safeguards noted in the compliance protection section, authority would be divided in the following ways:

- Washington State agencies would have the authority to develop final prediction of fish run sizes; the authority to promulgate fish escapement plans based on run size predictions; the authority to promulgate harvest regulations for the SCMZ, based on run size predictions and State; and the authority to promulgate sport fishing regulations everywhere in the State except on reservations.
- The Tribal Commission would have the authority to promulgate commercial regulations in the Tribal Commercial Management Zone (TCMZ) and regulations governing all on-reservation fishing.
- The authority to issue permits for enhancement projects would belong to the State for off-reservation projects and to the Tribal Commission for on-reservation projects;
- The authority to operate license and fleet adjustment programs would rest with the State for non-Indians and with the Tribal Commission for Indians;
- The authority to license nontribal charter boat owners, nontribal commercial salmon fishermen in the SCMZ, and nontribal sport fishermen everywhere but on reservation would rest with agencies of Washington State;
- The authority to license tribal fishermen anywhere, and, if desired, to license nontribal commercial fishermen in the TCMZ and all fishermen on reservation would rest with the Tribal Commission.
- The authority to close fisheries for conservation of the resource would rest with the State of Washington in the SCMZ; with the State, the Tribal Commission, and the tribes in the TCMZ; with the Tribal Commission and the tribes on reservations; and with the Fisheries Review Board anywhere in the State.

The management scheme would be aided by a joint technical committee composed of six scientists—three appointed by the State and three appointed by the Tribal Commission. The responsibility of the committee would be to review proposals and make recommendations to the appropriate managing agencies. The committee would act as a technical forum for resolution of biological or technological conflicts and would also have some responsibility to propose data collection requirements and methods. The only *power* of this committee would be to stop the issuance of permits for enhancement projects it considered technically unsound.

Analysis of Management Provisions

Management authority of the Tribal Commission and the State would not be coextensive within the two zones. The State's authority would include emergency conservation closure authority within the TCMZ, except for reservation areas; licensing authority for sport fishing within the TCMZ, except for reservations; authority to promulgate sport fishing regulations, to which tribal regulations would have to conform in part; control over the entire data system for both the TCMZ and SCMZ (tribes would be guaranteed access to it); and the final say on the harvest plans for the SCMZ and the TCMZ, except for reservations.

The sole intrusion of the Tribal Commission into the SCMZ would be the authority to license treaty fishermen. In addition to this disequilibrium of power, it is clear that what occurs in terms of harvest plans and enforcement activity in the State Commercial Management Zone (SCMZ) would dominate all the fisheries and determine resource availabilities in the TCMZ. The same is not true for the TCMZ, except that failure of the Tribal Commission to live up to the terms of the proposal could affect the escapement goals for replenishment of the resource. Three factors would weigh against such a possibility: the State's power for emergency conservation closures in the TCMZ, the Fisheries Review Board's emergency conservation authority everywhere, and the tribal self-interest in a continuing fishery. Similar constraints are not apparent to

forestall failure of the State to exercise power appropriately in its zone, where, historically, overfishing has passed greater conservation responsibilities onto tribal fisheries.

Furthermore, the management authority of the Tribal Commission, although it appears to be broader than the current authority of the tribes, actually would not be. For example, the Tribal Commission could develop regulations for fishing in the TCMZ, but the number of fish reaching the TCMZ would depend on the number that could get through the State-controlled SCMZ. The Tribal Commission could bring Indian violators into a newly established Tribal Commission court, but it would have no judicial control over non-Indians fishing anywhere. The Tribal Commission could order a conservation closure in TCMZ waters, but in all likelihood such a closure would only affect tribal fishermen, because non-Indian commercial fishermen would do their fishing in the SCMZ and sport fishermen who might fish in terminal areas would not be affected by a Tribal Commission conservation closure except on reservation. The Tribal Commission could license tribal fishermen to fish anywhere in the State, subject to ceilings on the numbers of licenses set out in the plan, but when they fished beyond the TCMZ they would be subject to State regulations, State enforcement officers, and the State judicial machinery. It was because of the abuse of State authority that the Federal district court orders provided tribal authority exclusive of State authority at off-reservation fishing grounds. Despite this, under the settlement plan the Tribal Commission would not have concurrent jurisdiction over Indians fishing in the SCMZ, even though the State would have total jurisdiction and enforcement authority over non-Indians fishing in the TCMZ.[188]

Taken altogether, the plan removes any tribal control (except licensing) over tribal fishing in usual and accustomed areas incorporated into the SCMZ. For tribes that are traditionally marine fishermen, like the Makahs, this provision removes most of the fisheries' jurisdictional authority recognized by the Federal district court. For all tribes involved, this provision constitutes a major reduction in their off-reservation fishing rights.

Compliance Protection

The settlement plan envisions a newly created Fisheries Review Board at the top of a system of "integrated State/tribal management." Although this location is accurate structurally, it carries few, if any, implications of power or authority.

The Fisheries Review Board would be made up of three representatives of the tribes, three representatives of the State, and one party acceptable to all. It would have a limited staff, relying primarily on the expertise of the Washington Department of Fisheries (WDF), the Washington Department of Game (WDG), and the Tribal Commission. Its role would be to review the actions of those three bodies and the Federal agencies to assess whether the settlement were being successfully implemented. Only WDG, WDF, or the Tribal Commission could bring a compliance matter to the attention of the board.[189] Individual complainants may bring matters to the attention of WDF, WDG, or the Tribal Commission, any of which, in turn, may eventually refer a complaint to the board.

The board's powers would be: to request but not to order compliance; order conservation closures anywhere (it could not, however, lift such a closure imposed by any of the parties); to adopt WDF, WDG, or Tribal Commission regulations as Federal regulations where such regulations were not or could not be effectively enforced; to make binding decisions between competing, biologically sound enhancement projects, one of which is off reservation and the other on reservation; to make a finding of substantial noncompliance and recommend suspension of management functions to a three-judge Federal court, which in turn could order the appropriate Federal department to assume the functions;[190] and to issue an annual report on the implementation of the settlement to the Federal Government. Parties could appeal a decision of the board to the Federal district court; however, in order to reverse a decision of the board, the court

[188] The January draft of the plan would have provided the tribal commission court with authority over non-Indians in the TCMZ unless preempted by the State. Regional Team of The Federal Task Force on Washington State Fisheries, "Proposed Settlement for Washington State Salmon and Steelhead Fisheries," factsheet no. 1, p. 3 (Jan. 16, 1978) (hereafter cited as "January Draft"). The provision was probably deleted in light of the *Oliphant* decision (Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)), which eliminated tribal judicial authority over non-Indians.

[189] "Settlement Plan," *Seattle Hearing*, vol. IV, pp. 81–84.

[190] The proposed resort to a three-judge Federal court to adjudicate matters of substantial noncompliance is a change from the January draft of the plan, which would have required Federal agencies to preempt management authority in such cases without a judicial determination or order. "January Draft," p. 9.

would have to find it to be "clearly erroneous," a difficult burden to meet.[191]

At a minimum, a major gap in the authority of the Fisheries Review Board, not residing anywhere else in the integrated management system, is the power to compel any agency to issue appropriate harvest plans and regulations and the authority to order closures of the fishery for allocation of the resource in order to achieve the goals of the settlement plan. The coordinated system for development of predictive models and regulations should not be confused with the authority to control any aspect of resource management. If agreement were not reached among managing agencies on any question, the authority to make a final decision, subject to limited appeal rights, is designated in the plan to either the State or the Tribal Commission as above noted.

The Tribal Commission

Treaty-recognized fishing rights belong to the individual tribes. For coordination purposes, entities have been established in each treaty area and for the case area. The jurisdictional authority to license, tax, and regulate is vested in the tribes and not in any of the coordinating entities. The Tribal Commission, to be created under the plan, would be established by the tribes delegating their individual jurisdictional authority to this single entity. The Tribal Commission would have the authority to run a fishery-related justice system, to license treaty fishermen, to tax the treaty right, and to operate the full range of the remaining tribal management functions in the TCMZ. If the Tribal Commission wished, it could redelegate its authority to individual tribes in their reservation areas. The Tribal Commission would also have the authority to license nontreaty fish-catchers in the TCMZ, including reservations. Apparently the only authority retained by the tribes would be to effect conservation closures for commercial fishing in the TCMZ and for all fishing in reservation areas.

Jurisdiction has been an explosive issue in Indian country; tribes do not lightly give up jurisdiction to anyone, whether the entity is Indian or non-Indian. History has shown that the powers tribes give up are rarely, if ever, recaptured. Major changes in Federal law would be required to effect a transfer such as the one proposed.

The Tribal Commission could not exercise any authority other than licensing treaty fishermen within the SCMZ, whereas both the Department of Fisheries and the Department of Game would have some jurisdictional powers within the TCMZ. Although the Tribal Commission would have access to data and would collect data for the TCMZ, the control of data, including the allocation of the harvest, would be a State function. In addition, the Tribal Commission's role with respect to WDF and WDG management functions would be to review and comment on State plans and refer compliance issues to the Fisheries Review Board. Neither the Tribal Commission nor the review board could compel compliance.

An additional problem is presented in relation to the proposed taxing authority of the Tribal Commission. *Tulee v. State of Washington* [192] held that the jurisdiction to tax the exercise of the treaty right resides with the tribes, not with the State, and presumably not with an artificially created tribal commission. Additional compliance protection is offered in provisions which state that a failure to meet resource distribution goals in any one year would be made up in succeeding seasons whenever practicable. The settlement plan, however, does not specifically delegate the authority to require adjustments by managing agencies for disproportionate resource distribution.[193]

Resource Distribution and Allocation

Separate resource distribution plans are offered for salmon and steelhead. It appears that tribes are being asked to relinquish a portion of their judicially guaranteed percentage of fishing opportunity in exchange for the promise of greater numbers of fish in the future. Short of conducting an independent technical review of Washington State fisheries, it is not possible to determine the likelihood that predicted fishing opportunity will actually occur or that the eventual division of the resource between treaty and nontreaty fishing interests will occur.

Eventual fishing opportunity will depend on the success of a complex enhancement plan, augmentation of tribal fishing fleets and diminishment of non-Indian commercial fleets (both outlined at length in the plan),[194] and the practical ability of Indians to fish successfully at the same time and in the same waters as non-Indians who will outnumber them.

[191] Ibid., pp. 84–89.
[192] 315 U.S. 681 (1942).
[193] "Settlement Plan," *Seattle Hearing*, vol. IV, pp. 114 and 267.
[194] Ibid., chaps. 6 and 8, pp. 285–348.

There are still some points that may be noted about the distribution. The plan endeavors to distribute the salmon resource by establishing fishing limitations on treaty and nontreaty fishermen and on fishing by different gear types in designated areas. The following geographical areas are considered separately under the plan:

1. Columbia River
2. Willapa Harbor
3. Grays Harbor
4. Coastal rivers
5. Ocean
6. Strait of Juan de Fuca
7. Puget Sound and International Pacific Sockeye Fishery Commission (Canada-USA treaty) waters[195]

In two of these areas, Puget Sound and Grays Harbor, the plan would allocate a 40 percent opportunity for catching salmon to treaty fishcatchers, while nontribal fishcatchers are to be given an opportunity to harvest 60 percent.[196]

Treaty fishing is not recognized as a separate right in Willapa Harbor or the Pacific Ocean under the plan.[197] The Quinault Tribe is specifically expected not to pursue the establishment of treaty fishing rights in Willapa Harbor.[198]

The plan for the Columbia River is adapted from an agreement among the States of Washington and Oregon, the Yakima Nation, and three Oregon tribes. Broken down by species and run, the agreement is not susceptible to analysis of overall percentages of fishing opportunity between treaty and nontreaty fishing. Similarly, the coastal rivers portion of the plan sets minimum harvest goals for treaty tribes in terms of numbers of fish, not percentages, and the provisions for the Strait of Juan de Fuca limit treaty and nontreaty fishing to present levels without specificity as to overall percentages.[199]

It is difficult to compare this plan with the decision of the Federal district court in terms of ultimate fish catches for treaty and nontreaty fishcatchers because the bases of the two are so different. The Federal district court decision relies on a legal interpretation of treaty provisions to reach a finding of treaty fishing rights, expressed as a percentage of fish existing at any time. The settlement plan replaces the treaty provisions with a management system. It establishes rights to shares of fishing opportunity among competing user groups, and it divides an opportunity to harvest the resource numerically in some areas and on a percentage basis in others. For example, the resource distribution for the coastal tribes (Quinault, Hoh, and Quileute) is expressed in terms of "minimum harvest goals" for separate salmon species running in four coastal rivers. There is neither an expression of a right to a set percentage of the catch nor any guarantee as to when or if the minimum numbers will be available to these treaty tribes.[200] Thus, comparison to the existing right to 50 percent of harvestable salmon in off-reservation areas, as expressed in the Federal court decision, is not possible.

Some provisions can be compared, however, and where this can be done, treaty fishcatchers seem to be losing a portion of their adjudicated rights (or as expressed in the plan, forgoing exercise of these rights). For example, in the two geographic areas where overall percentage of fishing opportunity is expressed in the plan, the tribes are given the opportunity to catch 40 percent of the salmon, compared to the 50 percent level expressed in the Boldt decision. In addition, the 40 percent allocation of opportunity for Puget Sound origin salmon would include fish taken by the tribes on reservation and those caught by treaty fishcatchers for ceremonial and subsistence purposes. These categories of fish are available exclusively to the tribes under separate treaty provisions and do not count in the 50 percent share of off-reservation catches available to the tribes under the Federal district court's treaty interpretation.[201] The plan does not specifically compensate the affected tribes for this reduction in adjudicated fishing rights, nor does it offer any explanation why the adjudicated allocation of fish for these tribes was reduced in the plan.

Steelhead

The treaties make no distinction between salmon and steelhead, and the Federal district court and the

[195] Ibid., pp. 219–60.
[196] Ibid., pp. 219, 251.
[197] Ibid., pp. 226, 233.
[198] Ibid., p. 233.
[199] Ibid., pp. 222, 230–33.
[200] Ibid., pp. 237–40.

[201] This was later changed by the Supreme COurt decision that included on-reservation catches as well as ceremonial and subsistence catches in the tribal 50 percent share. Washington v. Washington State Commercial Passenger Fishing Ass'n, —U.S.—, 99 S. Ct. 3055, 3095–76 (1979). At the time the plan was produced, however, the tribes still had a legal right to these catches over and above their 50 percent allocation.

U.S. Supreme Court have held that the treaties apply equally to both species.[202] The plan seeks to alter this holding by recognizing tribal rights to fish steelhead but requiring that tribes forgo these rights.[203]

The plan would have 11 federally-recognized tribes[204] and 5 that may be recognized in the future[205] forgo their steelhead fishing rights completely. Three more tribes[206] would be required to stop their steelhead fishing, but due to their current economic dependency on the resource they would be provided with steelhead income replacement grants until enhanced salmon resources are available as an economically comparable, alternative fishing source.[207]

To determine the appropriate amounts of payment to these tribes, run size estimates and other calculations would be developed by the Washington Department of Game and the Tribal Commission, with the help of the joint technical committee. The Fisheries Review Board would review salmon enhancement program results and other management measures to determine when sufficient numbers of replacement species were available so that payments could be discontinued. Procedures are not spelled out by which compensation could be determined in the event of disagreements as to the data base. There is also no mention of the possibility of reinstituting compensation to these tribes in the event that salmon replacements decline in size after the Fisheries Review Board has ended compensation payments. It should be noted that in this section the plan speaks in terms of available replacement fish, not in terms of fish actually caught, and it does not identify the basis upon which the replacement grants would be determined.

Two tribes in the south Puget Sound area[208] would be permitted to fish for steelhead but restricted in the number of steelhead that could be commercially sold. In part, this is a recognition of a mixed run problem in which steelhead and the late running chum salmon pass through the river at the same time.[209]

Finally, three coastal tribes[210] would have their steelhead fishing eliminated in a four-phase process. Each phase of steelhead fishing reduction would be linked to specific guarantees that would eventually replace steelhead with a guaranteed minimum number of available salmon.[211] Again, by expressing salmon harvest guarantees in terms of *available* fish rather than fish actually caught, there is room for debate over how many fish are actually available. Also, there is no provision made for reintroduction of commercial Indian steelhead fishing in the event that numbers of returning salmon decline after replacement goals have been achieved.

Thus, judicially established tribal steelhead fishing rights, both on and off reservation, would be effectively eliminated for some tribes and replaced with a promise of salmon enhancement opportunities for others.

License and Fleet Size Adjustments

In recognition of the fact that there is an overcapitalized non-Indian fishing effort on salmon, the regional team recommended a reduction in the number of commercial salmon licenses, a reduction in charter boat licenses, and a "buy back" of vessels, gear, and licenses.[212] Due to the imbalance between Indian and non-Indian marine fleets, a modest buildup of Indian marine fishing power is proposed. Although the Indian fleet would be limited to a total size of 447, compared with 2,010[213] boats of the same classes for non-Indians after fleet reduction, it is expected that traditional terminal Indian gear, modernized with Federal aid,[214] could account for the fishing power necessary to bring Indian catch totals up to those proposed in the plan. A major purpose of the plan is to adjust treaty and non-Indian fleets so as to justify the elimination of special treaty Indian fishing days.[215]

Although the idea of reduction in the overall size of the fishing fleet has received general acceptance, there is no certainty that the regional team proposal, or any proposal for alteration of fleet size, would be effective in protecting Indian fishing opportunity. The regional team notes that a large portion of licenses are issued to persons whose boats produce only a small percentage of salmon landings.[216] It is useful to restrict the potential these relatively dor-

[202] *Id.* at 3071-3073.
[203] "Seattle Plan," *Seattle Hearing*, vol. IV, pp. 272, 275.
[204] Suquamish, Squaxin, Tulalip, Swinomish, Sauk-Suiattle, Nooksack, Lummi, Skokomish, Port Gamble, Makah, and Stillaguamish. Ibid., p. 277.
[205] Snoqualmie, Duwamish, Samish, Steilacoom, and Snohomish. Ibid.
[206] Muckleshoot, Upper Skagit, and Lower Elwah. Ibid.
[207] Ibid.
[208] Puyallup and Nisqually.
[209] Ibid., pp. 278, 279.
[210] Quinault, Hoh, and Quileute. Ibid., p. 279.
[211] Ibid., pp. 279-84.
[212] Ibid. p. 286.
[213] Ibid., table 8-5 p. 348.
[214] Ibid., table 8-3, p. 345.
[215] Ibid., pp. 212, 235.
[216] Ibid., p. 287.

mant licenses have for becoming productive elements in the fisheries, but it has also been noted that reducing the number of marginally productive boats means that more of the resource can be divided among the remaining gear holders.[217] Thus a reduction in the non-Indian fleet size does not necessarily equate with additional fish for fisheries farther down the line where most traditional tribal fishing is done. An increase in tribal marine fishing ability is not necessarily something tribes want to do, because it involves a change in the basic way of life for most tribes to move their fishing effort from river to marine waters.

Enhancement

A key element of the regional team's plan is enhancement—enlargement of the available resource. The settlement plan proposes an expenditure of $121.6 million to support an enhancement effort designed to add 5.7 million salmon to the harvestable resource, increasing it to approximately 15 million salmon over a 10-year period.[218] The enhancement money includes enough to raise the steelhead catch an additional 40,000 fish.[219] The mammoth enhancement effort is proposed in order to restore commercial viability to the fishing industry remaining after fleet alterations are made. The problems of substituting a promise of more fish for the right to catch fish guaranteed by treaties is discussed below.

General Analysis

The regional team drafted its plan upon the premise that the goal was to reach a result capable of passing muster in the political arenas of the State and the Federal Government. In testimony, as well as in the provisions contained in the plan, it is clear that the regional team considered the relative political strengths of the government and interest groups involved as the plan was being drafted.

As an example, the members of the team believed that it would be best for the fishery to coordinate management as much as possible.[220] In its plan for tribal management, the team suggested that the authority to manage the resource, which under the Federal district court decision each tribe possessed individually, be conglomerated. The team proposed that the new entity, the Tribal Commission, be established not simply as a coordinating entity among the tribes, similar to the Northwest Indian Fisheries Commission, but as a separate governmental entity to centralize the tribes' collective management authority.[221]

To the tribes, eliminating individual tribal management authority was a major unacceptable element of the plan. As Billy Frank, fish manager of the Nisqually Tribe and Northwest Indian Fish Commissioner, said:

> One of the things in that last report of the task force. . .is that it takes away our enforcement. It takes our usual and accustomed fishing areas, and it also takes away our management.
>
> Now, without the management, then I [might] just as well have never even started any kind of a process to have the *U.S. v. Washington,* and go through all these years of putting a good lawsuit against the State of Washington. . . .[222]

State management was a different matter, however. The regional team believed that in order to consolidate management functions there, the State legislature would have to approve a realignment of State agency functions, most likely involving the removal of steelhead management authority from the Department of Game. State sport fishing interests were viewed as having the political strength to prevent any such change of authority occurring in the State legislature. So with respect to management, the team recommended a system that it did not consider the fairest or the most sensible. The team had to go with an idea its members thought could best approach the desired results for the fishery and emerge intact from the State and Federal political gauntlets.[223]

More of the perceived political realities involved in addressing the fishing rights controversy become evident in view of the proposals put forward in the plan. One of these was the fact that non-Indian fishing groups would not accept any plan that permitted Indians extra fishing time. The extra Indian fishing time ordered by the Federal court as a remedial measure to allow Indians a realistic opportunity to catch their share of fish was viewed by

[217] "For example, an average of 3,366 boats per year were licensed for commercial salmon trolling during the 4-year period 1972–1975 but an average of 267 boats (or only 8 percent of the fleet) landed 50 percent of the catch." State of Washington, Department of Fisheries, *Status of Washington's Commercial Troll Salmon Fishery in the Mid 1970's* (1976) Technical Report 21, p. 27.

[218] "Settlement Plan," *Seattle Hearing,* vol. IV, pp. 185–400.

[219] Ibid., p. 173.

[220] Alverson Testimony, *Seattle Hearing,* vol. III, p. 34.

[221] "Settlement Plan," *Seattle Hearing,* vol. IV, p. 98.

[222] *Seattle Hearing,* vol. III, p. 124.

[223] Alverson Testimony, ibid., p. 35.

non-Indian fishcatchers, as well as the State court system, as discrimination against non-Indians. The large non-Indian fleet made it impossible for Indian marine fishcatchers to compete for their court-determined share of fish without special help. The Federal court decision provided this by allowing Indians to fish at places and times closed to non-Indians.[224] The mischaracterization of the remedy as discrimination became the justification for the illegal fishing that has been damaging the resource. It was well understood when the plan was devised that there was too much non-Indian fishing gear in the water, with or without Indian competition. An obvious answer to this problem and the disparity in Indian fishing power was to limit the size of the non-Indian fleet. Non-Indian fishing groups objected to the imposition of limitations on the size or fishing opportunity of the non-Indian fleet. They objected even more, however, to allowing Indians extra fishing time.[225] It was possible, in this case, to require a trade in the plan providing for a partial reduction in the size of the non-Indian fleet and a concurrent increase in Indian gear to a point where the fleets would be close enough in size (in the view of the regional team) to eliminate extra treaty fishing days.[226]

Though this compromise was viewed as being politically palatable to the resistant non-Indian commercial groups, it would be a partial abrogation of treaty rights for tribes that customarily fished in rivers. Instead of allowing fish to return to those usual and accustomed tribal fishing places, which were along rivers, the provision would force tribes, in part, to change their fishing styles. Cheap and efficient methods developed by Indians to catch fish near their homes would be shifted to make Indians more competitive in deepwater areas of the bays, Puget Sound, and the Pacific Ocean. Although boats would be provided by the Federal Government, maintenance, insurance, fuel, repairs, and other incidental costs would have to be borne by Indians, who, though they might profit from these changes, would also be subject to a significantly greater risk of loss. A major point of the Federal court case was to guarantee a meaningful right not just to catch fish, but also to catch them in a tribal manner. The plan moves tribes toward a change in the traditional fishing culture they tried to preserve through the treaties.

The trade off made little biological sense, because moving part of the fishing effort of river tribes to deeper waters would exacerbate the problem of mixed stock fisheries. Simply stated, fish in marine waters come from different rivers. When they return to spawn a new generation, they return to those rivers. Fisheries on mixed stock cannot differentiate among fish headed for different rivers, and so a moderate fishing effort might underharvest one river's fish stock while severely overharvesting another. A more appropriate answer biologically would be to switch fishing effort nearer to originating rivers, but such a solution would be unacceptable to the commercial non-Indian fleet. Encouragement of river fishing would also make more sense in this age of rising fuel prices and fuel shortages,[227] but, again, such considerations had to be subordinated to an approach deemed politically acceptable.

Another perception of political reality was that the State would not be favorably disposed to any plan that challenged its management authority. As Gordon Sandison, director of the Washington Department of Fisheries, plainly put it, "I don't think the Federal Government should be involved in managing the fisheries of the State of Washington."[228] When the regional team was created, there were clearly two factors that challenged the State's authority. One was the Federal judiciary itself, which was managing the fishery on a day-to-day basis due to State default in complying with Federal orders, and the other was the ruling of the court that recognized the right of Indian tribes to manage their own off-reservation fisheries at "usual and accustomed places," free from State interference except for conservation purposes.

The plan was more subtle in addressing these perceptions. By a combination of provisions, it would have effectively made State control dominant, even though abuse of State power in controlling fisheries was a basic reason for the Federal litigation in the first place. Elimination of usual and accustomed fishing places in favor of Tribal Com-

[224] United States v. Washington, 459 F. Supp. 1020, 1036 (Decision, Injunction, and Order of Sept. 12, 1974) (limitation on harvest); *id.* at 1125, 1129 (Preliminary Injunction of June 6, 1978).

[225] Puget Sound Gillnetters Ass'n v. Moos, 565 P.2d 1151 (Wash. 1977).

[226] James Waldo, interview in Seattle, Wash., Aug. 15, 1978; Purse Seine Vessel Owners Association, Response to Settlement Plan for Washington State Salmon and Steelhead Fisheries, July 31, 1978, *Seattle Hearing*, vol. IV, exhibit no. 10, p. 631.

[227] In 1977 trollers with gross receipts between $10,000 and $20,000 reported that fuel costs averaged about 6 percent of those receipts. *Petry Report*, p. 152.

[228] Gordon Sandison, testimony, *Seattle Hearing*, vol. I, p. 18.

mercial Management Zones (TCMZ) reduced tribal authority to smaller, less productive areas.[229] Tribal fishcatchers in usual and accustomed grounds not included within the TCMZs would be subject to State regulations and State criminal prosecution for violations. Freeing tribal fishcatchers from this type of control, which in the past had been coercively used, was a major victory for the tribes that would be rendered nugatory by these provisions. Creation of an impotent review process to replace the authority of the Federal district court would eliminate the State's fear of Federal judicial sanctions. The creation of a Tribal Commission to replace the authority of individual tribes would tamper with the essence of tribal government and reduce the power of individual tribes to have a say in a matter of fundamental importance to each of them. Although this consolidation of tribal authority may never be acceptable to the tribes, it would certainly be looked upon with favor by the State, since it would be a smaller, less representative body, more subject to manipulation.[230]

Finally, there may have been a perception that to make the plan acceptable, more fish had to be made available to all fishcatchers. The regional team proposed to gain support by recommending Federal enhancement money for the construction of fish hatcheries and habitat improvements that, according to their calculations, would double the size of the available resource. At least with respect to tribes, it was perceived that treaty rights were not the issue but the commercial value of fish that was the priority interest. According to regional team member John Merkel, treaties "can be done away with—anything can be modified—it is just a question of money. . . .If they want principles instead of fish, that's their business."[231]

The promise of resource enhancement as a substitute for the exercise of tribal fishing rights is a matter that raises both legal and practical questions. The members of the regional team did not view the legal implications of enhancement in a uniform way. Mr. Merkel saw it as just an incentive to bargain, not to be equated with the purchase of treaty rights in a constitutional sense.[232] Dr. Alverson saw enhancement clearly as an exchange offered to the tribes in which their right to a fixed percentage of fish was being traded for the promise of an increased number of fish.[233]

This divergence in views made little difference in the setting of a settlement agreement, but in the context of an involuntary legislative settlement, were the plan to be congressionally enacted, Dr. Alverson's view might be taken to mean that enhancement constitutes payment for the taking of tribal rights. That line of reasoning would require evaluating the treaty right in dollars and equating that with the value of enhancement dollars, a process not performed.[234]

Enhancement is not a simple matter of planting more fish and reaping more return. There are many complicating factors such as disease, ocean interceptions, and the carrying capacity of waterways that have an impact on the return on the investment in enhancement. There is sufficient disagreement among biologists on what can be achieved through enhancement[235] to make it doubtful that any proposed enhancement could be considered the constitutionally required "just compensation" for the taking of tribal treaty rights.

There is also a significant question as to who benefits from enhancement. Since Indians are generally the last in line to fish, the mere fact that more fish will be produced is not a guarantee that the tribes will get them.[236] In addition, it appears that enhancement of the resource has been made necessary, irrespective of the recognition of Indian treaty fishing rights, in large measure from overfishing, property development, dam building, environmental degradation, and other factors beyond the control of the tribes involved.[237] To the extent that enhancement replenishes the salmon supply depleted by these non-Indian causes, it is, at most, payment for damage already done rather than compensation to the tribes for rights that might be lost as a result of enacting the plan.

Battling Back to Court

The work of the regional team of the national task force progressed from April 1977 through June 1978. During this time, there were other arenas in which the fishing rights battle was being fought.

[229] Kinley Testimony, *Seattle Hearing*, vol. III, p. 122.
[230] See State of Washington, Department of Fisheries and Game, *Comments on Settlement Plan for Washington State Salmon and Steelhead Fisheries and Alternative Fishery Management Plan*, Aug. 22, 1978, *Seattle Hearing*, vol. IV, p. 425.
[231] John Merkel, interview in Seattle, Wash., Aug. 11, 1978.
[232] *Seattle Hearing*, vol. III, p. 37.
[233] Dayton L. Alverson, interview in Seattle, Wash., Aug. 11, 1978.
[234] Merkel Testimony, *Seattle Hearing*, vol. III, pp. 36–37.
[235] Alverson Testimony, ibid., pp. 37–38.
[236] Morisset Testimony, ibid., p. 73.
[237] Ibid., p. 37.

State and Federal judicial systems became embroiled in a battle of their own as two separate lines of decisions worked their way through the courts.

In essence, when the Federal court ruled in 1974 that the Indian tribes of western Washington had fishing rights that entitled them to a realizable opportunity to catch half the harvestable salmon and steelhead entering the waters of the State, it did so with the expectation that the enforcement machinery of the State would be used to secure the Indian fishing rights determined to exist by the court.[238] As indicated previously, this did not come to pass. By the summer of 1977 the situation was viewed as critical:

> The State. . .with well publicized reluctance, issued regulations which, if enforced, would have met the district court's requirements. . .State prosecutors refused. . .to prosecute violations in the few instances where the State issued citations.[239]

On June 9, 1977, the State supreme court ruled that, as a matter of State law, State enforcement officials had no authority to enforce regulations designed to allocate fish between Indians and non-Indians.[240] State officials were caught in the middle of Federal court rulings ordering them to enforce Federal law and State courts telling them they had no authority to do so.

The State court cases held that under State law the Washington State Department of Fisheries had no authority to allocate fish among competing groups using the same type of fishing gear and that it was beyond the power of the Federal district court to require State officials to act beyond their statutory authority. The State supreme court also decided that fishing regulations that differentiated between Indians and non-Indians were unconstitutional discrimination and therefore could not be enforced by the State Department of Fisheries.[241]

All parties in these State cases were winners. The cases consisted of fishing associations, representing members who did not want to be subject to the treaty rights rulings of the Federal court, bringing an action against the State government, which did not wish to enforce its reluctantly established treaty allocation regulations anyway. Despite the cozy relationship between plaintiffs and defendants in these cases, the resulting elimination of State authority left a void in enforcement of the Federal court's orders.

Responding to this dilemma, the Federal district court stopped trying to work through the State government and, instead, took over fishery management directly, to the extent it thought necessary to protect the treaty right.[242]

Without the assistance of the State, the only method available to the Federal court to enforce its decree was through Federal agencies. Accordingly, the court issued a series of orders through which the treaty fishery was removed from State jurisdiction[243] and transferred to Federal enforcement agents. To prevent non-Indians from further violating treaty fishing rights, the Federal court required that they call a special telephone number before going fishing to find out which marine areas would be open to salmon fishing.[244] Then the court, through its appointed advisor, went about the process of gathering data and making determinations on which portions of the fisheries should be opened and closed or otherwise regulated in order to achieve the result of allocating an appropriate share to the tribes.

The court's assumption of direct control over fishing was not based upon any statute, but rather upon the equitable power of a Federal court to enforce its own decisions. Thus, the court had to use its contempt powers to prevent violations of its orders. This method was, at best, awkward. To hold non-Indians in contempt who were fishing in violation of court orders, they had to be notified officially of the court's injunction. This required that copies of the orders be served upon each individual fishcatcher. To do this, the court ordered agents of the National Marine Fisheries Service, the United States Marshals Service, and the Coast Guard to carry copies of the injunction to State-licensed, commercial net salmon fishcatchers. After 2,445 fishcatchers had been served with notice, the judge entered an injunction requiring them to obey fishing orders

[238] United States v. Washington, 384 F. Supp. 312, 415-16.
[239] Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1128 (9th Cir. 1978).
[240] Puget Sound Gillnetters Ass'n v. Moos, 565 P.2d 1151 (Wash. 1977).
[241] Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 571 P.2d 1373 (Wash. 1977); Purse Seine Vessel Owners Ass'n v. Moos, 567 P.2d 205 (Wash. 1977); Puget Sound Gillnetters Ass'n v. Moos, 565 P.2d 1151 (Wash. 1977).
[242] Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d 1123, 1129 (9th Cir. 1978).
[243] *Id.* at 1126.
[244] United States v. Washington, 459 F. Supp. 1020, 1125 (W.D. Wash. June 1978) (preliminary injunction).

established by the court or risk being held in contempt.[245]

The State of Washington and groups representing non-Indian fishcatchers appealed the orders of the Federal district court, claiming, among other things, that the district court was: denying non-Indians their right to equal protection of the law by allocating fish to Indians, exceeding its authority by assuming direct control over the State's responsibility for fish management, and violating the rights of non-Indian fishcatchers by requiring them to obey an injunction issued in a case in which they were not technically involved as parties.[246]

The Federal court of appeals issued its decision with the historical intransigence of State institutions on treaty fishing cases clearly in mind. The difficult situation facing the Federal district court was noted in the opinion of the Federal appellate court when it stated:

> The state's extraordinary machinations in resisting the decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases [citations omitted] the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.[247]

The Federal court of appeals carefully restricted its review to the propriety of the Federal district court's direct intervention into fishery management and the enforcement orders generated by it. The court did not reopen the matter of actual allocation, i.e., the percentage of fish due to the treaty tribes, noting that the allocation question had already been litigated and decided in 1974 and made final after available appeals were exhausted.[248]

Given the chain of events that preceded the Federal district court's removal of the treaty fishery from State hands, the court of appeals upheld the district court's actions as being reasonable:[249]

> Enforcement is a problem because the state, its courts, and the non-Indian fishers have never fully accepted the principle that treaty rights can be claimed by a politically impotent minority. Before 1977 the State enforced the district court's orders grudgingly at best. The current crisis is the result of a breakdown in state law enforcement in 1977.[250]

Based upon the State's refusal to enforce Federal law, the court of appeals held that the Federal district court had the authority to use the equitable powers possessed by Federal courts to protect those rights.

The alternatives would have been to force the State government to comply with Federal court orders by holding State officials in contempt of Federal court or to allow treaty rights to fall in the face of official and private resistance. Thus, with no other viable choices, the Federal court fashioned an appropriate remedy in undertaking fishery management and enforcement for the benefit of the treaty tribes.

The specific legal arguments raised before the court of appeals were found by it to be without merit. The court of appeals reiterated the holding of the *Sohappy* case in Oregon, which had decided 8 years earlier that there was no denial of equal protection of the law in allocating the fish resource between Indians and non-Indians, or by separately regulating the fishing activities of these two groups.[251] The rights of the Indians to fish came from the treaties that legitimately recognized them and their successors as a separate political group with distinct rights in the fisheries.[252] The court pointed out that race was only a factor in determining who was a member of the specific political group that had a treaty agreement with the United States. Indians who were not members of treaty tribes had no special rights and, as a race, were subject to fishing laws of the State just like anyone else.[253]

The court of appeals also held that there was no merit to the argument that the district court was without authority to impose its orders directly upon the non-Indian fishcatchers themselves, who techni-

[245] United States v. Washington, 459 F. Supp. 1020, 1125 (W.D. Wash. June 1978) (preliminary injunction).

[246] Puget Sound Gillnetters Ass'n v. United States District Court, 573 F.2d, 1123, 1127, 1129, 1132 (9th Cir. 1978). In the case leading to the Federal district court decision in 1974, fishing associations and non-Indian fishcatchers were not technically parties. Any rights or privileges they may have in the fishery, however, are derived from the State, and so their interests were legally presumed to be represented by the State. *Id.* at 1132.

[247] *Id.* at 1126.

[248] *Id.* at 1129.

[249] *Id.*

[250] *Id.* at 1128.

[251] *Id.* at 1127–28.

[252] *Id.* at 1128.

[253] *Id.* at 1127–28.

cally were not parties to the earlier litigation that had decided the extent of the treaty fishing rights. The Federal court of appeals found that the interests of the non-Indians were in fact represented by the State, and, given the failure of the State to enforce the decision against them, they could, with proper notice, be made subject to the contempt power of the Federal court.[254]

A troubling aspect of the dispute in 1977 was the direct confrontation that had developed between State and Federal judiciaries. The State supreme court decisions were used as the basis for a ruling that not only prevented the Washington Department of Fisheries from enforcing the Federal court allocation orders but went beyond them, requiring the department to violate those orders by promulgating fishing regulations that would allow non-Indian fishcatchers to take much of the treaty Indian share.[255] The Federal court responded to the State trial court's ruling by blocking the State court's order and by enjoining that court from taking any further actions to violate the Federal court's orders.[256] The Federal court of appeals found this action by the Federal district court to be totally appropriate under the circumstances.[257] The confrontation between court systems, however, was obvious and extreme, and, as the interplay continued, the fish resource was being damaged.

This new litigation series gave the State its opportunity to claim that there was now an absolute division of authority between State and Federal courts that only the United States Supreme Court could ultimately determine. The State of Washington and the associations representing its non-Indian fishcatchers were still eager to have the case reviewed by the United States Supreme Court. One representative of non-Indian commercial fishcatchers expressed a prevailing non-Indian view at the time:

> . . .we have a confrontation between State courts and Federal courts. . . .So that the simple solution is to have the entire Boldt decision heard by the Supreme Court. I can't see any other honorable way out for our country. . . .I can't understand that our Justice Department and Interior Department haven't insisted on this. This just seems like simple justice and the American way to me.[258]

The State, nominal loser in the State supreme court cases as well as in the case before the Ninth Circuit Federal Court of Appeals, filed petitions for review with the United States Supreme Court.

The response of the United States to these petitions was to become the source of a separate controversy between the tribes and the Federal Government. From the tribal viewpoint, the case was over and they had won. Their fishing rights had been judicially established, and the Federal district court was prepared to take control of the fishery as necessary to protect their rights. The authority of the Federal district court to do this had just been completely upheld by the court of appeals, and it finally looked as though treaty rights might be honored in a way that would mean fish for the tribes. The United States Departments of Justice and the Interior, however, did not agree with the tribal view. They were concerned that the State-Federal conflict was serious and that a decision by the U.S. Supreme Court on the fundamental meaning of the treaties might finally end the dispute and restore order.[259]

When the tribes learned that the United States as a litigant was considering a position of agreeing to review by the U.S. Supreme Court, they protested vehemently. Tribal attorneys joined in a memorandum adamantly opposing further review.[260] There were many reasons to oppose review. First, as a general matter, the winner of a case does not seek further review, since any review runs the risk that the lower court's decision might be reversed in whole or in part. In this case, the tribal attorneys believed that a victory in the Supreme Court would solve very little because, in order to overcome the State refusal to protect treaty rights, the State legislature would have to grant affirmative authority to the State Department of Fisheries to regulate the resource in a way that would assure an allocation for the tribes. The U.S. Supreme Court, in their view, could, at best, completely uphold the basis of Judge

[254] *Id.* at 1132.
[255] Puget Sound Gillnetters Ass'n v. Sandison, No. 58107 (Superior Court, Thurston County, Wash. 1977).
[256] Order of Aug. 31, 1977, United States v. Washington, 459 F. Supp. 1020, 1104 (W.D. Wash. 1978).
[257] 573 F.2d at 1133.
[258] Green Testimony, *Seattle Hearing*, vol. III, p. 98.
[259] Brief for the United States on Petitions for Certiorari, filed Sept. 19, 1978, at 19–21, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, —U.S.—, 99 S. Ct. 3055 (hereafter cited as *U.S. Brief on Petition*).
[260] Mason D. Morisset, Steven S. Anderson, Alan C. Stay, Thomas P. Schlosser, William M. Rodgers, Jr., Litigation Memorandum to the United States Department of the Interior, Department of Justice, and Solicitor General of the United States, Aug. 10, 1978. (Commission files.)

Boldt's original decisions, and it would then still be up to the Federal Government to enforce any orders of the Federal district court, as it was already doing.[261]

The complexity of the case was also viewed as a problem, because omission or distortion of relevant facts might result in an adverse ruling on some aspect of the case not fully brought out in appellate argument. This fear was, in part, based on prior Supreme Court rulings in the *Puyallup* cases mentioned earlier. Tribal attorneys pointed out that in the second *Puyallup* case to reach the Supreme Court, three justices said they would have decided an issue concerning hatchery fish adversely to the tribes even though that point had not been fully litigated.[262] Similar problems might arise in a new Supreme Court decision if the whole fishing rights case was reopened.[263]

The United States Department of Justice recognized that there were cogent reasons why the case should not be reviewed, including the complexity of the case, the fact that the bases of the case had been affirmed twice by the Ninth Circuit Court of Appeals, and that the Supreme Court of the United States had previously denied timely review of those basic issues, making the ruling of the lower courts on those points a definitive statement of law, which the non-Indians were trying to relitigate.[264] The Justice Department, noting these points, said, "In these circumstances, we would normally urge denial of the petitions for certiorari."[265]

Instead, the Solicitor General of the United States, who determines the positions to be taken by the United States before the U.S. Supreme Court, chose to acquiesce in Washington State's request for a hearing. Three "very real practical problems" were cited as reasons for agreeing to the review. First, the conflict of State and Federal decisions had caused a breakdown in enforcement leading to the destruction of the fish resource; second, the Federal district court had become a manager of fisheries in Washington State on a day-to-day basis, a function that should be in State hands; and third, the Federal Government had been forced to concentrate a disproportionate share of its limited enforcement personnel on local enforcement.[266]

One element that must be incorporated into the decisionmaking process of the Solicitor General in a case involving Indian rights is the view of the Department of the Interior, regardless of whether that position is finally used in court. Interior is the Federal department having primary responsibility for administration of the United States' trust relationship with Indian tribes. The Solicitor of the Department, as its chief legal officer, communicates Interior's litigative positions to the Department of Justice, which then, after adding its own judgment, represents the view of the United States in court. In this case, the Solicitor of the Interior Department communicated his views on the petitions for review pending before the Supreme Court to the Solicitor General.

Despite recommendations to the contrary from the tribal attorneys, the Associate Solicitor for Indian Affairs,[267] and the Assistant Secretary for Indian Affairs,[268] Interior's Solicitor suggested that the United States accede to the requests for U.S. Supreme Court review and that the review be limited to the issue of the propriety of the district court's allocation of 50 percent of the harvestable salmon resource to Indian tribes. In a letter to the Solicitor General of the United States, the Interior Department Solicitor suggested that settling the interpretation of treaty rights at the U.S. Supreme Court level would resolve the differences between Federal and State courts that if continued would, in his view, inevitably lead to a direct conflict over control of the salmon resource.[269] Apparently, the view was that instead of making the conflict between the State and Federal courts the main item for review, the difference between those court systems' interpretations of treaty rights would be made the central issue. A definitive ruling by an authority superior to both court systems would cause the other differences between State and Federal courts flowing from that matter to dissolve.

In suggesting this course, the Solicitor was advocating the most risky course for the treaty rights. If

[261] Ibid., pp. 3–4.

[262] Ibid., p. 5.

[263] A simple illustration of this problem is the notion that equal time and access to the fishery would provide Indians a fair and equal share of fish caught. A failure to understand that most Indian "usual and accustomed" fishing places are at the end of the line could blind a court to the reality that the right to such places would be devoid of meaning if non-Indians were allowed an untrammeled opportunity to catch all the fish before the fish could get to those places where Indians catch them.

[264] *U.S. Brief on Petition* at 19.

[265] *Id.*

[266] *Id.* at 19–20.

[267] Thomas W. Fredericks, Memorandum to the Solicitor, Aug. 17, 1978. (Commission files.)

[268] Forrest Gerard, Memorandum to the Solicitor, Aug. 17, 1978. (Commission files.)

[269] Leo Krulitz to Wade H. McCree, Jr., Aug. 18, 1978. (Commission files.)

the U.S. Supreme Court review were confined to a consideration of the propriety of Federal district court orders allocating fish to treaty Indians, its decision would have no direct effect on the question of the State's responsibility to enforce any such allocation order. Furthermore, by focusing Supreme Court attention on allocation, tribes would have nothing to gain directly, because they already had the best allocation of the resource they could expect to achieve. It would be quite possible, however, for the Supreme Court, in its decision, to reduce the allocation to tribes or in some other way jeopardize tribal fishing rights already established in lower Federal courts.

Although the Solicitor General did not take this advice and request the Supreme Court to limit its review to the 50–50 allocation of fish, he did acquiesce in the requests for Supreme Court review by Washington State and non-Indian fishing groups. The Solicitor General listed the allocation question as the first of six questions presented to the Court by the case.[270]

The differing interests of the tribes and the United States were clearly demonstrated in this case. Only the first reason given for reviewing the case, i.e., the impact on the resource of the failure to enforce the treaty rights decision, was a matter of concern to the tribes. The second reason given, the need for the Federal district court to manage the fishery on a day-to-day basis, and the third reason, that the Federal Government was being forced to concentrate limited enforcement resources in Washington State, were matters of State-Federal conflict and Federal budgetary problems that legally had nothing to do with the tribal interest in securing fishing rights.

Determining which government has a responsibility to enforce established treaty rights is a very different question from allowing a redetermination of what those treaty rights mean. It was thus in the interest of both the tribes and of the United States as trustee to have these rights enforced, but it was only in the interest of the United States, not as trustee, to settle the enforcement issue both as a State and as a Federal responsibility. Such a decision would shift a significant share of the enforcement burden from the United States, which is primarily responsible for upholding its treaty agreements with tribes, to the State, which already has an operating enforcement apparatus.

If the United States can obtain the assistance of the State (or any other entity) to enforce its treaty obligations, without damaging the rights involved, then that is an acceptable way to fulfill a Federal obligation, but the obligation remains with the United States. The desire of the United States to stay out of local fishery management or to reduce the level of commitment of its enforcement resources is irrelevant to this obligation. If, as in this case, the alternate means chosen fails to meet the obligation, the United States must reassume an active role. In fact, for the latter half of the 1977 fishing season and the entire 1978 season, the Federal Government had made a substantial commitment to the enforcement of the Federal district court's rulings. It created an interagency pool of Federal enforcement officers to carry out the court's orders, consisting of officers from the Departments of the Interior, Justice, Commerce, and Transportation.[271]

The commitment of these resources, however, was viewed as a strain on Federal resources that the United States would prefer not to have to continue. As expressed in the filings of the Federal Government before the U.S. Supreme Court, Federal enforcement of treaty fishing rights was viewed as a temporary measure, to be replaced once again by State enforcement apparatus once the matter had been settled legally.[272]

To the extent that Federal actions are motivated by a desire to get out of the management and enforcement responsibilities which it was forced to undertake, there is an underlying danger that treaty rights may be compromised. That danger is particularly noticeable in this case. Ending Federal intervention puts significant authority over treaty right fishing back into the hands of the same State government that had ignored treaty rights until forced to recognize them and then resisted their implementation with recalcitrance strong enough to motivate Federal courts to point it out separately in their own judicial opinions.

Agreeing to have the Supreme Court reopen the entire decision upholding treaty rights was certainly not the only available course of action. Instead, the United States could have suggested review limited (as it was by the Ninth Circuit Court of Appeals) to

[270] *U.S. Brief on Petition* at 3.
[271] U.S., Department of the Interior, "Report on Implementation of the Helsinki Final Act," Washington, D.C. 1979, pp. 35–37.
[272] Brief for the United States filed Jan. 30, 1979, at 81, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, —U.S.—, 99 S. Ct. 3055 (1979).

a determination of the responsibility of State courts to uphold Federal rulings on treaty rights. With that issue stated as a limiting ground rule, arguments of all parties could have been restricted to proceeding from the basis that the allocation orders based on 1974 treaty rights interpretations were all final and not subject to further review. In that context, only the State-Federal conflict would have been presented, and the decision, no matter what it was, would deal only with how the rights would be enforced. The rights themselves would not be subject to modification.

The United States could also have opposed review outright and shifted its effort toward seeking from Congress whatever additional authority or budgetary support it might have needed to create an effective management-enforcement presence on a permanent basis. Although the creation of a continuing Federal enforcement presence would have been a fundamental change from the view that regulation of fishing in State waters is a State prerogative, a strong argument could have been made to the Congress that Washington State had so thoroughly defaulted in its obligation with respect to treaty rights that jurisdiction to regulate or enforce any aspect of treaty right fishing should be removed from its authority.

Neither the above approaches nor any similar alternative was tried. In recommending a full review of the basis for the 1974 decision of the Federal district court establishing treaty fishing rights, the Department of Justice threw its considerable weight behind the State's position that the U.S. Supreme Court should make its own determination of what the treaty rights really meant. Once again, the tribes faced the prospect of a new judicial determination of the rights they possessed.

The Supreme Court Hears the Case

The Supreme Court decided that it would hear the case. As the Indians had feared, the issues before the Court were not restricted, as they had been in the circuit court of appeals, to the propriety of the Federal district court's assuming control over treaty right enforcement. The substance of the decision allocating a set share of the catch to treaty tribes was considered a central and reviewable issue.

When it filed a brief with the Court, the Department of Justice significantly altered the position expressed in its acquiescence to Supreme Court review. In its brief, the United States argued principally that the substance of the lower court's decisions, including the allocation of fish between Indians and non-Indians, should not be reviewed. Instead, it argued that the authority of the district court today to enforce the law, which it determined to be applicable to the case 5 years earlier, should be supported and upheld over the objections and interference of the State court system.[273] The scope of review suggested by the Department of Justice was essentially the same as that utilized by the Ninth Circuit Court of Appeals that refused to reopen the question of the propriety of the allocation of fish to treaty Indians because that had been established as law through earlier decisions.

It is difficult to tell whether the U.S. Supreme Court might have restricted its review, as the court of appeals had, if the Justice Department had expressed a desire to restrict review when the Supreme Court was deciding whether or not to hear the case. At that time, as noted in the previous section, the Department was suggesting to the Supreme Court that it fully review the basic treaty rights decision, hoping that this time a firm statement from the Supreme Court would make it clear that the Federal court interpretation of treaty rights was correct and entitled to be enforced.[274]

On July 2, 1979, the U.S. Supreme Court issued its long awaited opinion in the case.[275] The Court reviewed the original decision of the Federal district court, the Boldt decision, upholding it almost entirely. It upheld the district court's determination of what constitutes "usual and accustomed" fishing places.[276] It upheld the conclusion that the treaties did grant rights to the Indians separate from those which non-Indian citizens have.[277] It upheld the district court's authority to enforce its own decision when faced with a State refusal to do so, and it included in that enforcement power the ability to require compliance by non-Indian fishcatchers even though they were not technically parties to the case.[278] In a footnote, the Supreme Court disposed of the State's argument that enforcement of treaty rights through an allocation of the fish would violate

[273] *Id.* at 46–47.
[274] *U.S. Brief on Petition* at 22.
[275] State of Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, —U.S.—, 99 S. Ct. 3055 (1979).
[276] *Id.* at 3064–65.
[277] *Id.* at 3070, n. 22.
[278] *Id.* at 3068, n. 32.

equal protection principles, noting that this issue had already been decided correctly in previous Federal cases, which held that there was no denial of equal protection.[279]

The Supreme Court agreed with the lower court's understanding that the treaties were not the result of military conflict, nor were the Indians a "conquered" society. Instead, these were arm's-length negotiated agreements by which land and rights were traded away by the tribes in return for promises of protection and guarantees acknowledging rights reserved by them.[280]

Yet, despite these rulings, the tribes did lose some of the things they had won in Judge Boldt's court. The 50 percent allocation of the district court was modified downward by including in its calculation the subsistence and ceremonial catches that the lower court had considered to be a separate category exclusively owned by the tribes and not to be shared.[281] The Supreme Court also decided that fish caught on reservation were to be included in the 50 percent treaty right, despite the lower court's determination that "on-reservation" catches, covered separately in the treaties, were the exclusive possession of the tribes.[282]

The Supreme Court added some confusion to the determination of the appropriate allocation by declaring that the 50 percent figure was a maximum amount for the treaty tribes. It said that the percentage was subject to downward adjustment, based on changing circumstances such as a decreased need for subsistence fishing, but it failed to set the criteria upon which such a decision was to be made.[283] Thus, further negotiation, legislation, or perhaps more court battles are likely on this point.

Although the tribes clearly won their case in the Supreme Court, they cannot sit back and enjoy the victory. The matter is still not completely settled, and even if it were settled judicially, the Congress would not be required to let the decision stand as it is.

Epilogue

The U.S. Supreme Court has made its decision, upholding lower Federal court decisions that recognize separate treaty fishing rights among certain northwest Indian tribes. The Court has decided that treaty rights may be honored by allocating a set share of fish to treaty tribes and that such an allocation is not unlawful discrimination. Now that these issues have been determined, there is the question of the practical effect of the decision for treaty and non-Indian fishcatchers in Washington State.

One immediate effect of the decision is to remove the impediment to State enforcement of treaty rights, held to exist by the Washington State Supreme Court. This means that the State Department of Fisheries has the authority to promulgate regulations restricting non-Indian fishcatchers in order to provide an opportunity for tribes to catch their allotted share of the fish runs.

Public statements by State officials, issued shortly after the U.S. Supreme Court's decision, indicated a recognition that the State had a responsibility to protect tribal treaty fishing rights. They also forcefully declared that the "State of Washington should be the manager of the salmon fishery."[284]

One problem with the U.S. Supreme Court's decision is that it did not affirmatively establish the specifics of tribal management rights, but merely left the lower court rulings undisturbed on that issue. The previous pattern was that the State ignored treaty rights until told otherwise by a Federal court. If the State does show good faith by establishing regulations that effectively allocate half the fish to tribes, if it does not try to seize on ambiguous language or issues not fully decided by the Supreme Court to modify the intent of Federal decisions interpreting treaty law, if it does not in practice manipulate control over fisheries in a manner that forces Indians back to court to protect their rights, then the State will have broken sharply with the historical role it has played.

There are already some indications that the State plans to extend its fisheries authority following the U.S. Supreme Court decision. Early statements by State officials to the effect that the whole concept of tribal self-regulation in their fisheries is "out the window as a result of the . . .decision,"[285] and that

[279] *Id.* at 3068, n. 20.
[280] *Id.* at 3069.
[281] *Id.* at 3076.
[282] *Id.* at 3075–76.
[283] *Id.* at 3075.

[284] State of Washington, Office of the Governor, News Release, July 17, 1979; State of Washington, Department of Fisheries, News Release, "Supreme Court Ruling," July 2, 1979.
[285] Slade Gorton, State attorney general, quoted in *Tacoma News Tribune*, July 4, 1979, p. B-14.

the decision has given the State a new power to regulate on-reservation fishing for conservation[286] are interpretations beyond the actual decision of the Court and indicate a likelihood of further friction between tribes and the State in the coming years.

In the first season following the decision, the tribes have seen a diminution of non-Indian illegal fishing, but they have also had to protect themselves from the exercise of the State's power through proceedings before the Fisheries Advisory Board.[287] As the tribes try to work with the State on a day-to-day basis to ensure that State fishing regulations will protect their interests, there remains the larger question of whether the treaty allocations and tribal management authority determined to exist by Federal courts will be left intact in the next forum—the Congress.

The Carter administration proposed legislation to deal with three aspects of the Washington State fishery covered in the settlement plan written by the regional team of the Federal task force. Initially, the proposal called for $90 million to be used over the next 10 years for fish enhancement, buy back of non-Indian gear, and buildup of Indian fishing capability. Of the total, $75 million was set aside for the first two purposes, with the State expected to provide matching funds doubling the total.[288] After hearings in Washington State and Washington, D.C., on the proposal, legislation was introduced that would assist in overcoming economic dislocation caused by the implementation of the decisions in *United States v. Washington.* Some of the provisions of the bill include:

- a mechanism to provide Federal funds for the enhancement of the salmon and steelhead resources;
- a mechanism to provide Federal funds to purchase and retire commercial and charter fishing vessels, gear, and licenses;
- the development of coordinated planning by the State and the tribes (represented by the Northwest Indian Fisheries Commission) for research, enforcement, enhancement, and management of the salmon and steelhead resources.[289]

As legislation moves through Congress, non-Indian interest groups will undoubtedly try to amend it to limit judicially determined treaty rights. For example, the Washington Department of Game and its constituency persist in their efforts to reestablish total control over steelhead management, as that department[290] and sportsmen continue to apply pressure to classify steelhead as a "national" game fish, not to be captured by net or other more efficient, traditional Indian means despite treaty rights. The Senate bill requires that benefits of steelhead enhancement shall accrue to the recreational fishery.[291]

There may also be efforts to deal administratively with issues raised by phase II of the fishing rights case that is still to be litigated in the lower Federal courts. This part of the case concerns two questions. One is how and whether hatchery fish should be considered in determining the number of fish to be allocated to Indians and non-Indians.[292] The second question involves the rights of tribes to have a say in governmental decisions that have an effect on fish environment. These issues have all the explosive potential of the recent phase I litigation. Whether and to what extent phase II will be incorporated into any legislative measures dealing with treaty fisheries is another consideration before the Congress.

The fishing rights conflict is very much a study in frustration. Indian tribes have been fighting for their economic survival throughout this century. When non-Indian institutions, like courts and legislatures of the State and Federal governments upon which they have had to rely, have failed them, they have lost their promised rights. When some of those institutions have supported them, the battle itself has been moved to a different forum. The struggle, like the fish, is cyclical and ongoing. It requires tribes to be ever vigilant to protect their fishing rights from many forms of direct attack as well as indirect assault. Through all the battles, they must move with caution. They are a political minority with assets envied by others. They have had to pay law firms and technical experts in order to retain their rights, and they have had to deal extensively with all

[286] State of Washington, Department of Game, News Release, "Game Director, Sees Hope For Fisherman in Supreme Court Ruling," July 3, 1979.

[287] Michael Grayum, letter to Marvin Schwartz, U.S. Commission on Civil Rights, December 1979, Commission files.

[288] U.S., Department of the Interior, Office of the Secretary, News Release, Aug. 16, 1979.

[289] S. 2163, 96th Cong., 2d sess. (1980). The Senate bill was passed on May 5, 1980, and referred to the House of Representatives.

[290] Ralph W. Larson, director, Washington Department of Game, written statement, *Hearing Before the Senate Committee on Commerce, Science, and Transportation,* 96th Cong., 1st sess., Aug. 18, 1979 (hereafter cited as *Commerce Hearings).*

[291] Earle Engman, Washington State Sportsmen's Council, Inc., written statement, *Commerce Hearings.*

[292] The State, the Federal Government, and the tribes each have hatchery facilities producing substantial numbers of artifically propagated fish.

branches of State and Federal governments in order to give lasting effect to last century's promises. The situation is perhaps most easily summarized by the remark of one Indian fish manager: "Well,. . .if they could get the politics out of the management of the fish, we'd have some."[293]

Findings

Fishing Rights

1. Indian tribes have been in conflict with the States over fishing rights throughout this century.

2. The Federal Government as guarantor of Indian fishing rights has not effectively protected and assured these rights.

3. Throughout this century, the State of Washington has utilized its governmental authority in such a manner as to deprive Indians of their fishing rights.

4. Indian tribes have been blamed erroneously for the crisis concerning the scarcity of fish.

5. The fishing rights conflict, which is a dispute over property rights, has racial dimensions.

6. The Federal Government has played the following contradictory roles in the fishing conflict:

- counsel for tribes in much of the litigation;
- mediator in the fishing crisis through the establishment of a Federal task force;
- regulator of the fishery; and
- financer of State fishery programs.

7. By establishing a task force designed to renegotiate treaty rights, the United States failed to act as trustee, operated with a substantial conflict of interest, and subjected the tribes to a political process in which the tribal position was weakened.

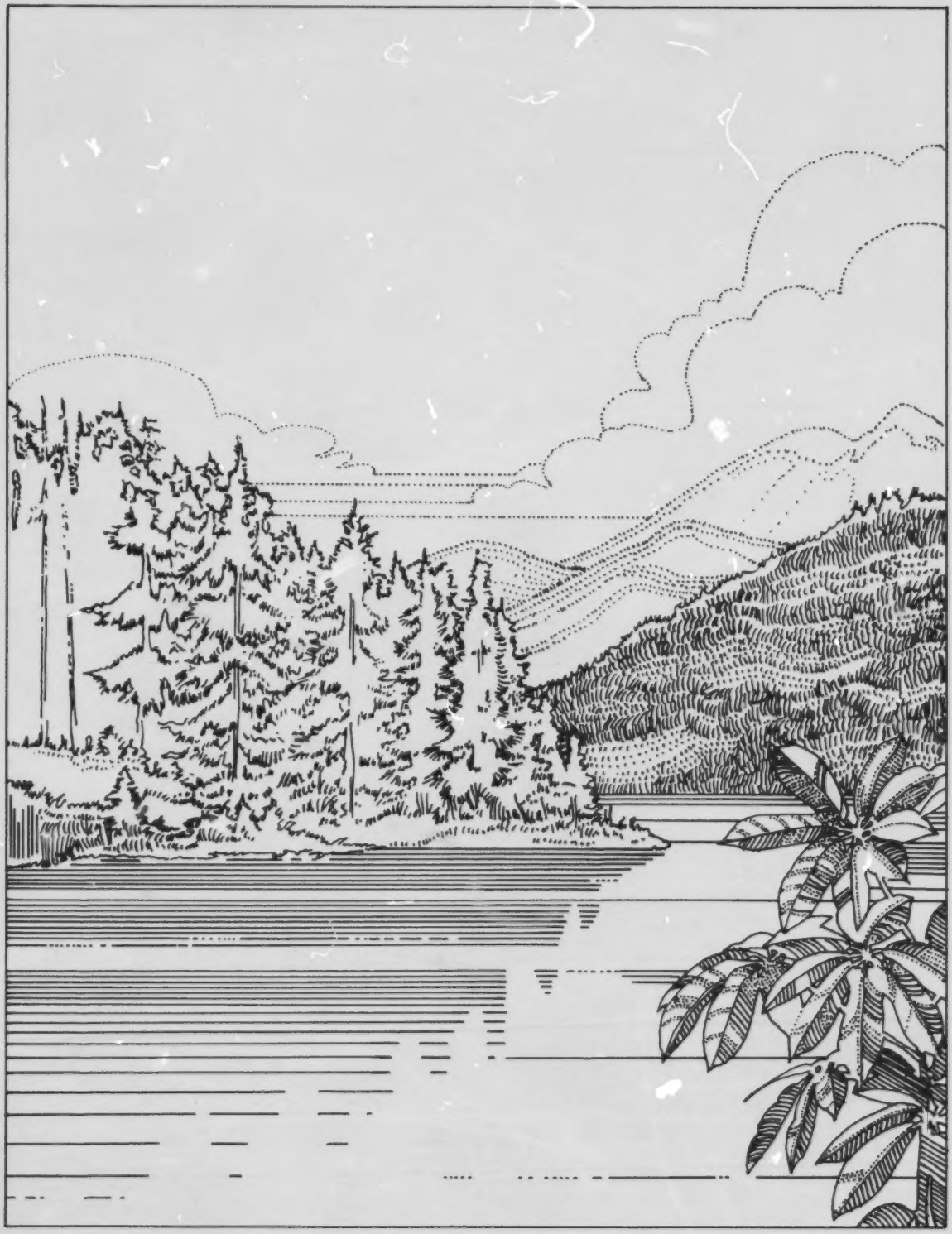
Recommendations

Fishing Rights

1. Congress should provide for enhancement of the salmon resource, diminution of the inflated non-Indian fishery, the development of tribal fishery management capacity, and increased coordination between the various State, tribal, and Federal entities with jurisdictional responsibility.

2. In the absence of an effective Federal, tribal, and State management mechanism, a continued strong Federal presence, such as that currently provided by the Federal court, is required to implement and enforce treaty fishing rights.

[293] Guy McMinds, testimony, *Seattle Hearing*, vol. III, p. 126.



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Chapter 4

Eastern Land Claims

> . . .[The Maine Indian claim] is potentially the most complex litigation ever brought in the Federal courts with social and economic impacts without precedent and incredible potential litigation costs to all parties. . . .A Congressional solution should be reached before the process. . .has reached its ultimate conclusion. . . .[1]

For decades, the "sleeper" among Indian rights issues was eastern land claims. Non-Indian landowners were unaware of the "cloud" on the horizon or were confident that traditional defenses of time[2] would defeat any possible Indian rights to the land. A flurry of court actions, however, have found Indians' title claims to be meritorious, thus unsettling the bond and real estate markets, throwing entire towns into uncertainty, and sparking much rhetoric.

The basic Eastern Indian land claim is that Indian land in the East was invalidly transferred from Indians to non-Indians in the 18th and 19th centuries because the Federal Government, although required to do so, did not supervise or approve the transactions.

The ultimate issue is not whether these transactions were fair or unfair, but whether they were legal. It was as if the lands were obtained from a minor without the consent of the minor's legal guardian. It would not matter whether the minor was cheated, deceived, or even provided with reasonable compensation for the land taken, the transaction would be fatally flawed and voidable. Although the issue of the fairness or unfairness of any particular transaction is not legally germane, it would be erroneous to assume fairness. The national record with respect to these transactions, as noted previously in this report,[3] is permeated with gross abuse of Indian land rights.

The reactions of State and local governments have ranged from the bombastic to the relatively cooperative. Eastern tribes have viewed their tentative successes as "vehicles for the return of a sufficient land base to assure future economic viability and cultural survival."[4] Their spirit does not seem to be one of vengeance; rather, their goal appears to be to use their court victories as a bargaining tool in negotiations with the States and landowners, with Congress eventually approving Federal funds to support whatever settlements are obtained.

Colonial History and Status of Eastern Tribes

During the exploration period in North American history, an important question of international law arose concerning the treatment of property rights of Indian tribes. In 1557 Charles V of Spain sought the advice of Francisco de Victorio, a prominent theologian. Victorio concluded that the Indians were true owners and "discovery" could not convey the title, for title by discovery can be justified only where property is ownerless. A just war to obtain title was

[1] U.S., Department of Justice, *Memorandum to the U.S. District Court, Northern District of Maine* (Jan. 14, 1977), reprinted in 123 *Cong. Rec.* S3205 (daily ed. Mar. 1, 1977).

[2] E.g., adverse possession, laches, and estoppel.

[3] See chap. 2.

[4] *Native American Rights Fund Announcements*, vol. 4 (August 1977), p. 3 (hereafter cited as *NARF Announcements*).

impossible, and only through consent of the Indians could sovereign power be secured.[5]

Victorio's principles were not universally followed. The conquistadors and pirates of 16th century Spain, for example, argued that Indians were heretics, tainted with mortal sin and irrational. But Victorio retorted that even heretics and sinners could own property and could not be punished for their sins without trial, and the Indians were at least as rational as some Spaniards.[6] The debate continued throughout the 16th, 17th, and 18th centuries.[7] In the British colonies, the problem of dealing with the Indians was largely left up to each colony, except during the French and Indian War.[8]

Although discovery, according to Victorio, did not itself divest the Indians of all their rights to land, it was a universally recognized principle of international law that discovery did vest certain exclusive rights in the discovering sovereign. As Chief Justice John Marshall described the principle in an early Indian case:

> Discovery gave to the nation making the discovery, as its inevitable consequent, the sole right of acquiring the soil and of making settlements on it. . . .It was an exclusive principle which shut out the right of competititon among those [Europeans] who had agreed to it. . . .It regulated the discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.[9]

In short, it was the exclusive right to negotiate with the tribes.

Indian title to land, known as "aboriginal title," has been based on the recognition that Indians were the "owners and occupants of the territory where they resided before the first approach of civilized man to the western continent, deriving their title. . .from the Great Spirit, to whom the whole earth belongs."[10] Chief Justice Marshall, however, made a crucial distinction between Indian title lands and other more protected forms of ownership. Indian title lands were not to be provided the full panoply of property rights, such as the constitutional right to just compensation for governmental takings.[11] Indian or aboriginal title is frequently contrasted with "recognized title"—title that draws its authority from treaty, act of Congress or the President, or some form of governmental recognition. Indian title was predominant in eastern tribes, while recognized title was the general rule in the West. The two forms of title have not been treated alike. Indian lands based on recognized title are protected with fifth amendment just compensation rights, while Indian title lands are not.[12] To date, the only eastern land claims based on recognized title have been those of the Oneida Indian Nation[13] the Mashpee Tribe,[14] the Cayuga Indian Tribe, and the St. Regis Mohawk (Akwesasne Tribe),[15] while all others rest on aboriginal rights alone.

Among the Thirteen Colonies, Great Britain possessed the right of discovery, although Indian land was acquired by each individual colonial government. By the mid-18th century, nine colonies had enacted laws forbidding the purchase of Indian lands unless such transactions were approved by the respective governmental authorities.[16] This practice served as precedent for the Federal Government after the American Revolution. By means of the Treaty of 1783,[17] the Thirteen Original States stood in the shoes of Great Britain with respect to rights of discovery, or preemption, as it was later called.

During the American Revolution, a number of Indian tribes fought on the side of the United States. The Passamaquoddies and Penobscots in Maine had

[5] Felix S. Cohen, *Handbook of Federal Indian Law* (Albuquerque, University of New Mexico Press: 1942 facsimile ed.), pp. 46–47.

[6] Felix S. Cohen, "Original Indian Title," *Minnesota Law Review*, vol. 32 (1947), p. 47. See also, Felix S. Cohen, "The Spanish Origin of Indian Rights in the Law of the United States," *Georgetown Law Journal*, vol. 31 (1942), p. 1.

[7] *See, e.g.*, authorities cited by counsel in Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

[8] Walter H. Mohr, *Federal Indian Relations* (1933), pp. 4–9, quoted by Felix S. Cohen in *Federal Indian Law*, p. 47.

[9] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832).

[10] Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872).

[11] Johnson v. M'Intosh, 21 U.S. at 587. For a history of Indian title, see Note, "Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial," *Columbia Law Review*, vol. 75 (April 1975), pp. 655–75.

[12] *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); Note, "Indian Title: The Rights," p. 671.

[13] Oneida Indian Nation v. County of Oneida, No. 70-CV-35 (N.D. N.Y. Nov. 9, 1971), *aff'd*, 464 F.2d 916 (2d Cir. 1972), *rev'd & rem.*, 414 U.S. 661 (1974), 434 F. Supp. 527, 533 (N.D. N.Y. 1977).

[14] Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1977).

[15] No action has yet been filed on behalf of the Cayugas and the St. Regis Mohawks, but negotiations are underway. Treaties that recognize the tribes are: Treaty of Fort Stanwix of 1784, 7 Stat. 15; Treaty at Fort Harmar of 1789, 7 Stat. 33; Treaty with the Six Nations of 1794, 7 Stat. 44.

[16] Cohen, *Federal Indian Law*, p. 47.

[17] Definitive Treaty of Peace with Great Britain, Sept. 3, 1783, Great Britain-United States.

a significant role in extending the border with Canada to its present location.[18] The Wampanoags in Massachusetts suffered a severe loss of 70 men, although their tribe numbered only a few hundred,[19] and the Oneidas were responsible for breaking up the British allegiance among the powerful Iroquois alliance known as "The Six Nations."[20]

The Continental Congress took great strides to secure and preserve the friendship of the Indians[21] and instituted a number of treaties.[22] In like manner, after the Federal Constitution was ratified, one piece of legislation passed in the First Congress was the "Indian Trade and Intercourse Act," more commonly known as the Nonintercourse Act of 1790.[23] The pertinent part of the act, which is still in effect, provides:

> No Purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.[24]

Shortly after its passage, President George Washington interpreted the first Nonintercourse Act in a speech to the Seneca Nation:

> Here, then, is the security for the remainder of your lands. No State, no person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights. But that, when you may find it for your interest to sell any part of your lands, the United States must be present, by their agent, and will be your security that you shall not be defrauded in the bargain you may make. That, besides the before mentioned security for your land, you will perceive, by the law of Congress for regulating trade and intercourse with the Indian tribes, the fatherly care the United States intend to take of the Indians.[25]

Every court that has examined the purpose of the Trade and Nonintercourse Act has agreed that the congressional intent was "to protect the lands of the Indian tribes in order to prevent fraud and unfairness."[26]

Neglect and Disuse of the Nonintercourse Act

Even though the Thirteen Original States had the right to negotiate for Indian lands within their boundaries, the Nonintercourse Act subjected any such negotiations to Federal approval. It did not take long, however, for these two issues to blur. As a consequence, States that possessed the right to negotiate came to believe it was also proper for them to exercise the right without Federal supervision.

In New York, in particular, a number of cases held that the Nonintercourse Act was not applicable to the Thirteen Original States. Although a land grant dispute in a case involving the Seneca Nation was found to be in compliance with the Nonintercourse Act, the New York court carved out an exception that subsequently became known as the "Thirteen Original States" doctrine:

> The original states, before and after the adoption of the Federal Constitution, assumed the right of entering into treaties with the Indian tribes for the extinguishment and acquisition of their title to lands within their respective jurisdictions. They exercised the power, which had before been vested in the crown, to treat with the Indians, and this they did independently of the government of the United States. This was notably true of the state of New York.[27]

As support, the court recited a long list of eminent Governors of New York who had negotiated treaties with the Indian tribes.[28] But in an era when the States were strong and the Federal Government was weak, such support could be mistaken.

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[18] See, e.g., Francis J. O'Toole and Thomas N. Tureen, "State Power and the Passamaquoddy Tribe: 'A Gross National Hypocrisy'?" *Maine Law Review*, vol. 23 (1971), p.1.

[19] Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 944 (D. Mass. 1978).

[20] Oneida Indian Tribe v. County of Oneida, 434 F. Supp. 527, 533 (N.D. N.Y. 1977).

[21] *Journal of the Continental Congress* (Library of Congress ed., 1775), vol. 2, p. 174, cited by Cohen in *Federal Indian Law*, p. 47.

[22] *See, e.g.*, Treaty of Fort Stanwix of 1784, 7 Stat. 15; Treaty at Fort Harmar of 1789, 7 Stat. 33.

[23] 1 Stat. 137, codified at 25 U.S.C. §177 (1976).

[24] 25 U.S.C. §177. For a legislative history of the act, *see* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 652 (N.D. Me. 1975).

[25] *American State Papers* (Indian Affairs, vol. 1, 1832), p. 142, quoted in Seneca Nation of Indians v. United States, 173 Ct. Cl. 917, 923–24 (1965).

[26] Passamaquoddy v. Morton, 388 F. Supp. at 656.

[27] Seneca Nation of Indians v. Christy, 126 N.Y. 122, 139, 27 N.E. 275, 279 (1891), *writ of error dismissed*, 162 U.S. 283 (1896). For a fuller discussion of this case and others, see O'Toole and Tureen, "State Power," pp. 1–39.

[28] Seneca Nation of Indians v. Christy, 126 N.Y. at 139, 27 N.E. at 279.

Other cases as recently as 1943 and 1958 also held that the Nonintercourse Act did not apply to the Thirteen Original States.[29] One of the 1958 cases on appeal at the Second Circuit tolled the death knell for the doctrine. In *Tuscarora* [30] the court noted that many land transfers in New York had occurred without Federal approval or else by tacit acquiescence from the beginning of this country's existence. Nonetheless, the court first maintained that "Indians are and always have been. . .the wards of the Nation and not of the States," and second that the Federal Government never relinquished its sovereign power over the Indians.[31] This pronouncement came down despite the longstanding tradition of special dealings that New York had with its resident tribes.[32] More recently, in both *Oneida* and *Passamaquoddy,* the courts have reiterated even more explicitly the lesson of *Tuscarora* that the "Thirteen Original States" doctrine is without merit.[33] And yet it is still periodically raised.

Maine's attorney general, in a memorandum to the Maine Legislature in 1977, explained that Congress had never intended the Nonintercourse Act to apply to New England.[34] Evidence he used to support this theory included the fact that both Congress and the executive branch knew the act was not applied in New England and did not express disapproval, one framer of the act even going so far as to buy aboriginal land in Maine.[35] Additionally, the administrative framework necessary to carry out the act was never set up in the East.[36] All these arguments were resurrected despite the words of the appeals court in the *Passamaquoddy* case[37] 2 years before:

> Congress' unwillingness to furnish aid when requested did not, without more, show a congressional intention that the Nonintercourse Act should not apply. . . .The reasons behind Congress' inaction are too problematic for the matter to have meaning for purposes of statutory construction.[38]

In addition to arguments that the Nonintercourse Act is inapplicable to Eastern Indian land claims has been the popular perception that a claim ought not to be brought that involves land to which clear title has been presumed for nearly 200 years. That feeling translates into the legal doctrines of "laches," "adverse possession," and "estoppel," which Maine's attorney general suggested were applicable to the Indians' land claims.[39]

Two eastern land claim cases have held that enforcement of State statutes involving time limitations "would be inconsistent with the federal posture of trust and vigorous protection of Indian rights."[40] Thus, the Federal trust responsibility overrides the interest the States have in preventing "stale" claims.

Lastly, the long term neglect and disuse of the act has led to a widespread unwillingness to take the claims seriously. "Is a law unenforced for many years still a law?" constitutes a lively jurisprudential debate. One writer describes how an Indian governor packed a council of tribal elders into his automobile upon discovering the ancient treaty that established the basis of their land claims and drove 200 miles to see the Maine attorney general. They were unable to meet with the attorney general and were told by an assistant to present their claim in court. The tribal leader had hoped that the matter could be resolved without ever going to court.[41] Although the initial response of the attorney general was probably predictable, subsequent court decisions have forced State officials and landowners to consider the claims more seriously.

Statute of Limitations for Indian Claims

In 1966 Congress for the first time created a time limit for the recovery of damages resulting from

[29] United States v. Franklin County, 50 F. Supp 152 (N.D. N.Y. 1943); St. Regis Tribe of Mohawk Indians v. State, 152 N.E. 2d 411 (C.A.N.Y. 1958); Tuscarora Nation of Indians v. Power Authority of New York, 164 F. Supp. 107 (W.D.N.Y. 1958), *modified,* 257 F.2d 885 (2d Cir. 1958); but *contra,* Buffalo R. & P.R. Co. v. Lavery, 27 N.Y.S. 433 (S. Ct. 1894), *aff'd on opinion below,* 149 N.Y. 576, 43 N.E. 986 (1896); United States v. Boylan, 265 F. 165 (2d Cir. 1920), *appeal dismissed,* 257 U.S. 614 (1921).

[30] Tuscarora Nation of Indians v. Power Authority of New York, 257 F.2d 885 (2d Cir. 1958).

[31] *Id.* at 889.

[32] *Id.*; see also Cohen, *Federal Indian Law,* pp. 416–24.

[33] Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).

[34] Attorney General Joseph Brennan, "Memorandum to the Members of the Maine Legislature" (Augusta, Me., Feb. 18, 1977), p. 5, reprinted in 123 *Cong Rec.* S3206–S3207 (daily ed. Mar. 1, 1977).

[35] Ibid., p. 6., 123 *Cong. Rec.* S3207 (Secretary of War Henry Knox).

[36] Ibid., p. 5, 123 *Cong. Rec.* S3207.

[37] Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

[38] Ibid., p. 378.

[39] Robert McLaughlin, "Giving It Back to the Indians," *Atlantic Monthly,* vol. 239 (February 1977), p. 82.

[40] Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780, 784 (D. Conn. 1976); Narragansett Tribe of Indians v. S. R.I. Land Dev. Corp. 418 F. Supp. 798, 804–805 (D.R.I. 1976).

[41] McLaughlin, "Giving It Back," p. 72.

trespass on Indian lands.[42] In 1972 when that time limit was due to expire and only one claim had reached a court, it was apparent to Members of Congress that more time was needed for either litigation or negotiation. Thus, in 1972, 1977, and again in 1980, Congress extended the time period.[43]

The Department of Justice supported the extension in 1977[44] because of its legal strategy in Maine, the cumbersome nature of the suits, and the likelihood that the current time limits would squelch negotiation attempts.[45] Secretary of the Interior Cecil Andrus also supported the extension because of "a sudden filing of massive cases, leading to economic disruption in several areas of the country, and injustice to smaller valid claims of Indian individuals which may be overlooked in the effort to timely file larger, known cases."[46]

Eastern Land Claims in Progress

Once the deadline for filing Indian land claims had been set by a special statute of limitations, a race to the courthouse commenced. Most eastern tribes, without recognition by Federal treaty or administrative programs, found their only recourse in law to be the Nonintercourse Act of 1790.[47] Each tribe had to develop its claim separately, taking cognizance of its own unique history and size.

Passamaquoddy Tribe v. Morton, the Foundation Case

Preliminary research in the Maine Indian land claims case dates back at least as far as 1957. In that year, an elderly and illiterate Passamaquoddy woman turned over to the Indian township governor, John Stevens, some long-forgotten papers she had discovered in her home.[48] The fragile documents included the Treaty of 1794, by which the Passamaquoddies and Penobscots ceded land, and letters from George Washington.[49] Mr. Stevens, concerned about the legal integrity of the tribes' lands and uncertain whether any constraints would prevent further seizures of the 17,000 remaining acres of tribal land, recognized the significance of this treaty, which was then 163 years old but largely unenforced.

After initial attempts at negotiation proved futile, the search for an attorney to represent the tribes lasted 9 years. Finally, in a trespass action brought by a non-Indian owner of rental cottages near the border of the Passamaquoddy Reservation, the tribe defended its members' action by arguing the Treaty of 1794. Although the Maine court did not apply the treaty to the case but dismissed it on other grounds, the Indians' Legal Services attorney agreed to pursue the claims.[50] Later, another Legal Services attorney would take over the Maine case, as well as all other New England Indian land claim cases.

By the fall of 1971, with his basic review of the law and historical evidence completed, the attorney representing the tribe, Thomas N. Tureen, published his findings in the *Maine Law Review,* [51] in order to "prepare the Maine bar for what was about to happen."[52] He concluded:

- The Passamaquoddies exist as a tribe and its land rights are to be protected by the Federal Government;
- Maine's power to make treaties and to exercise power over the Passamaquoddy Tribe and its lands require congressional consent;
- The burden of proof is on the State of Maine to demonstrate the basis for its asserted power over Indian lands and tribes in Maine; and
- While resolution of the issues will require a judicial determination, research strongly suggests that Maine's historical dealings with the Passamaquoddy are without legal authority.[53]

The Passamaquoddy and Penobscot Tribes took an important step in their effort to regain 10 to 12.5 million acres of the State of Maine—a territory covering over one-half of the State and populated by over 350,000 non-Indians. The total value of the

[42] Pub. L. No. 89-505, 80 Stat. 304 (1966) (codified at 28 U.S.C. §2415(b) (1976)). Any damages that allegedly occurred prior to 1966 were treated as if they occurred on the date of enactment. Any land suits had to then be filed within 6 years. Although the act did not expressly include suits brought by Indian tribes on their own behalf, it has been so construed. *See* Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 543 (N.D. N.Y. 1977).

[43] Act of July 18, 1972, Pub. L. No. 92-353, 86 Stat. 499; Act of July 11, 1977, Pub. L. No. 95-64, 91 Stat. 268; Act of Aug. 15, 1977, Pub. L. No. 95-103, 91 Stat. 842.

[44] U.S., Department of Justice, *Memorandum in Support of Plaintiff's Motion for Further Extension of Time to Report to the Court* (Feb. 28, 1977), reprinted in 123 *Cong. Rec.* S3209 (daily ed. Mar. 1, 1977). See also, 123 *Cong. Rec.* H5447 (daily ed. June 6, 1977).

[45] 123 *Cong. Rec.* S3211 (daily ed. Mar. 1, 1977).

[46] Secretary Cecil Andrus, letter to certain Members of Congress, June 16, 1977, reported in *NARF Announcements,* p. 22.

[47] Presently codified at 25 U.S.C. §177.

[48] McLaughlin, "Giving It Back," p. 71.

[49] Ibid., pp. 71-72.

[50] Ibid.

[51] O'Toole and Tureen, "State Power," p. 1.

[52] McLaughlin, "Giving It Back," p. 74.

[53] O'Toole and Tureen, "State Power," pp. 38-39.

claim, including trespass damages, is estimated at $25 billion.[54] By far the largest claim asserted and also the first case resting solely on the Nonintercourse Act, the Passamaquoddy claim has served as a foundation case for the other claims.

The Passamaquoddy Tribe petitioned the Department of the Interior in February 1972 to initiate a land claim on its behalf. If the Federal Government would institute a claim based on the trust relationship,[55] then the tribes would not need to take action themselves and pay the high costs of litigation. Furthermore, an important part of the claim was money damages against the State of Maine, which probably could be brought only by the United States because of sovereign immunity of the State.[56] The court of appeals later took notice of this problem, stating, "And without United States participation, the Tribe may find it difficult or impossible ever to secure a judicial determination of the claims."[57]

Although the Bureau of Indian Affairs (BIA) recommended filing suit on the Indians' behalf, the Department of the Interior rejected the recommendation on the basis that Maine Indians were not federally-recognized Indians. In a letter dated June 20, 1972, the Acting Solicitor of the Interior Department advised the Department of Justice that it would not request the bringing of a suit. The letter tated:

> [N]o treaty exists between the United States and the Tribe and, except for isolated and inexplicable instances in the past, this Department, in its trust capacity, has had no dealings with the Tribe. On the contrary, it is the States of Massachusetts and Maine which have acted as trustees for the tribal property for almost 200 years. . . .
>
> [A]s there is no trust relationship between the United States and this Tribe, we are led inescapably to conclude that the Tribe's proper legal remedy should be sought elsewhere.[58]

Two days later the Department of Justice notified the U.S. District Court for the Northern District of Maine that the United States would not bring suit against the State of Maine on behalf of the Indians[59] and enclosed a copy of the Department of the Interior letter.

The tribe, anticipating an adverse response from the Department of Justice, had already asked the U.S. district court to declare that the Nonintercourse Act created a Federal trust responsibility and to order the United States to file a lawsuit on their behalf before July 8, 1972.

On June 29, 1972, *United States v. Maine* [60] was filed by the United States for the Passamaquoddy Tribe and a similar action was filed for the Penobscot Indian Nation.[61] Both suits were for the purpose of preserving tribal rights vis-a-vis the statute of limitations and were held in abeyance pending the outcome of the tribal suit against the United States concerning the issue of Federal trust responsibility.

Judicial Affirmation of the Trust Responsibility

Two and one-half years after the tribe's action was filed, the district court handed down its decision. In the interim, the State of Maine had intervened as a party to the suit, joining the Interior and Justice Departments. In a three-part analysis, the court inquired: (1) Did the Nonintercourse Act apply to the Passamaquoddy Tribe? (2) Did the act impose a trust relationship between the United States and the tribe? and (3) Were there any procedural nuances that would stop the court from ruling upon the first two issues? Following 34 pages of legal analysis, the opinion, *Passamaquoddy v. Marton,* concluded:

> Judgment will be entered for the plaintiffs declaring that the Indian Nonintercourse Act. . .is applicable to the Passamaquoddy Tribe; that the Act established a trust relationship between the United States and the Tribe; that defendants may not deny plaintiff's request for litigation in their behalf on the sole ground that there is no trust relationship between the United States and the Tribe.[62]

[54] Stuart Taylor, "Indians on the Lawpath," *New Republic,* vol. 176 (Apr. 30, 1977), p. 21 (estimate by tribal attorney Thomas N. Tureen).
[55] The trust relationship is discussed in chapter 2.
[56] U.S., Congress, American Indian Policy Review Commission, Task Force Ten, *Report on Terminated and Nonfederally Recognized Indians,* "Federal Recognition and the *Passamaquoddy* Decision," by Thomas N. Tureen (Washington, D.C.: Government Printing Office, 1976), p. 1660.
[57] Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 376 (1st Cir. 1975).
[58] Acting Solicitor Ray Coulter, letter to Assistant Attorney General Kent Frizzell, Land and Natural Resources Division, June 20, 1972, *quoted in* Passamaquoddy Tribe v. Morton, 388 F. Supp. at 653.
[59] Passamaquoddy Tribe v. Morton, 388 F. Supp. at 654.
[60] Civil No. 1966 (N.D. Me).
[61] United States v. Maine, Civil No. 1969 (N.D. Me).
[62] Passamaquoddy v. Morton, 388 F. Supp. at 667. In considering whether the Nonintercourse Act applied to the tribe, the court relied upon principles of statutory construction, which prefer the literal meaning of a statute wherever such interpretation does not thwart the intent of Congress. Even when ambiguous, if the act confers benefits or protection, it must be understood in a nontechnical sense. Furthermore, any ambiguities are to be resolved in favor of Indians.

In December 1975, the Court of Appeals for the First Circuit upheld the district court's decision adopting in all important respects its reasoning and analysis. The central issue, the appellate court determined, was whether the Department of the Interior was correct in stating that the United States had no trust relationship with the tribe and thus should play no role in the tribe's land dispute with Maine. The court did not address the issue of whether the United States must sue Maine on the tribe's behalf,[63] as the lower court had done earlier.

An additional issue faced at the Federal appeals level was whether the tribe was barred from proceeding in the case because of any congressional action terminating the relationship or because of the tribe's own failure to have raised the trust issue for so many years. The court found no bar because the longstanding State relationship was insufficient to end the Federal relationship. Neither had Congress cut it off, as no express termination existed. The court refused to follow the Maine case of *State v. Newell.* [64] In *Newell,* the Passamaquoddy Tribe was found no longer to meet the criteria of political life and power.[65] The United States argued in *Passamaquoddy* that since the Federal Government had done nothing for over 80 years to overturn the *Newell* decision and recognize the tribe, silence equaled agreement. The U.S. court of appeals attacked this argument, explaining that there was no need for the Federal Government to react to the *Newell* decision because a State court decision had no effect on a Federal authority.[66]

Although the United States was not ordered to carry out specific duties, no excuse for filing an Indian land claim could be based on the severance of a trust relationship. The court instructed the Department of the Interior that there was no need to go beyond the Nonintercourse Act in seeking legal authority for bringing an action. The court, nevertheless, did not foreclose later consideration of whether Congress or the tribe acquiesced in the land transactions, or whether Congress ratified them. These unanswered questions triggered the Department of Justice and the State of Maine to hire a host of ethnohistorians and anthropologists to search for remnants of "long-forgotten treaties" and land giveaways predating 1790.

The Department of Justice later narrowed the claims to between 5 and 8 million acres.[67] This reduced the scope of the claims from approximately 60 percent to 40 percent of the State of Maine. The claims were not precisely drawn and were dependent upon high tide marks and watersheds.[68] Excluded from the amended claim were the heavily populated coastal areas, for which the United States said it would substitute a monetary claim.[69]

Along with narrowing the claims, the Department of Justice also pointed out the comparative advantage of a legislative solution over litigation, since it would take a great amount of time to locate the present landowners and litigation could not "correct the past injustices without creating new hardships for others."[70] Several attempts at congressional action and negotiated settlement occurred, ultimately resulting in a settlement in late 1980.[71]

Oneida v. County of Oneida

In a number of ways the *Oneida* case[72] is unique among Eastern Indian land claims. It is the only case that has been decided favorably on the issue of

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In applying these principles, the court found that "any Indians" or "any Indian nation or tribe" included the Passamaquoddy Tribe, even though they were not recognized by the Federal Government by formal treaty, statutory reference, or course of administrative conduct. In this case, it was acknowledged that the Passamaquoddies had always been viewed as a tribe of Indians. The court found no contrary intent of Congress, after sifting the cases that had previously construed the act. The basic policy of the United States as embodied in the act was to "protect the Indian right of occupancy of their aboriginal lands."

In determining whether the act imposed a trust relationship between the United States and the tribe, the court relied upon *Seneca Nation v. United States,* 173 Ct. Cl. 917, 923 (1965) where the courts were "first squarely presented with the question of the nature of the obligation, if any, imposed by the Nonintercourse Act." (at 661) In *Seneca,* the court found a "full fiduciary responsibility" to protect and guard against unfair transactions, not only the responsibility of a "mere contracting party or a better business bureau." (quoted at 662) Later cases reaffirmed *Seneca,* ending with *Federal Power Commission v. Tuscarora,* which specifically mentioned the purpose of the Nonintercourse Act: "to enable the Government. . .to vacate any dispostion of their [Indian] lands made without its consent." (362 U.S. 99 119 (1960).

Thus, the Federal district court concluded that the act established a trust relationship and the United States erred in refusing the Indians' request for litigation on the sole ground that no trust relationship existed between it and the tribe.

Finally, the court looked to whether three procedural defenses raised by the United States and the State of Maine precluded the court from ruling on the substantive issue. All were readily dismissed.

[63] Passamaquoddy Tribe v. Morton, 528 F.2d at 370 (1975).

[64] 84 Me. 465, 24 A. 943 (1892).

[65] *Id.* at 468, 944.

[66] Passamaquoddy Tribe v. Morton, 528 F.2d at 380.

[67] U.S., Department of Justice, *Memorandum to the U.S. District Court, North District of Maine* (Feb. 28, 1977), reprinted in 123 *Cong. Rec.* S3209–S3211 (daily ed. Mar. 1, 1977).

[68] *Bangor Daily News,* Mar. 2, 1977, p. 14.

[69] U.S., Department of Justice, *Memorandum* (Feb. 28, 1977), reprinted in 123 *Cong. Rec.* S3210 (daily ed. Mar. 1, 1977).

[70] Ibid., p. S3210.

[71] Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96–420.

[72] Oneida Indian Nation v. County of Oneida, 70-CV-35 (N.D. N.Y. Nov. 9, 1971), *aff'd,* 464 F.2d 916 (2nd Cir. 1972), *rev'd & rem.,* 414 U.S. 661 (1974), 434 F. Supp. 527 (N.D. N.Y. 1977).

whether the tribe's rights to land have been violated and the only modern eastern land claim to date to be considered by the Supreme Court. The Oneidas have not only held their lands through "aboriginal title," the right stemming from holding land for a long time, but also through recognition by Federal treaty.

The Oneidas were party to three treaties, dating from 1784 (prior to ratification of the Federal Constitution) to 1794.[73] The third treaty, the Treaty of Canandaigua of 1794, which included the Onondaga and Cayuga Tribes as well, guaranteed that lands reserved to the tribes would "remain theirs until they choose to sell the same to the people of the United States, who have the right of purchase."[74]

Acquisition attempts by New York State began as early as 1782.[75] Between 1782 and the passage of the Nonintercourse Act in 1790, millions of acres of Oneida land had been ceded. The Nonintercourse Act, however, did not have any effect on these dealings. Between 1790 and 1842, New York, despite specific warnings that it was violating Federal policy, acquired an additional 246,000 acres. It is these 246,000 acres that are the subject of the Oneida claim.[76] One historian has documented that although New York Governors and State Indian commissioners were specifically told they were violating Federal Indian policy, they chose to ignore the warnings and conducted treaty negotiations.[77]

Before research had begun on the Maine case, Indian claims in New York State were in progress. Several State court cases had held that the Nonintercourse Act did not apply to New York.[78] This interpretation came to an end when the Supreme Court dealt a final blow to the "Thirteen Original States" doctrine and set the stage for a number of claims.

The Oneida claim was filed with the Federal district court in 1970, but in the following year the court refused to rule on the case, stating that it had no jurisdiction because such an action to repossess land was proper only in the State court system.[79] The court of appeals upheld this view,[80] but the U.S. Supreme Court in 1974 reversed the decision and sent it back to the district court for further action.[81] In recognition of the Federal court's responsibility to hear the case, the Supreme Court directly attacked the Original Thirteen States doctrine by declaring:

> propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee to Indian lands in these States, or the preemptive right to purchase from the Indians, was in the State. . . .But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.[82]

Federal courts were determined, therefore, to be the proper forum when Indian tribal land claims are premised on violations of the Nonintercourse Act or of Federal treaties.

After the Supreme Court found that the lower court should have decided the case, the Oneida claim once more made its way into court. The Oneida claim was originally brought as a test case, claiming only the land in two counties and only requesting the rental value of the land for the 2 years prior to when the case commenced. By limiting the claim, the parties hoped to settle the issues in a calmer political atmosphere.[83] Thus, the first stage of litigation was to determine viability of the original claim. The second stage would examine the scope of liability for all claims, and the nature of relief would be the final issue contested.

In 1977 the first part of the three-part process for relief began. Liability was separated from a request for damages, and the Oneida title was found to be good. The Federal district court sifted through the historical background in the case and concluded that the Oneidas had established that the transfer of lands

[73] Treaty of Fort Stanwix of 1784, 7 Stat. 15; Treaty at Fort Harmar of 1789, 7 Stat. 33; Treaty of Canandaigua of 1794, 7 Stat. 44.
[74] 7 Stat. 44, 45.
[75] Jack Campisi, "New York-Oneida Treaty of 1795: A Finding of Fact," *American Indian Law Review*, vol. 4 (1976), p. 73.
[76] *NARF Announcements*, p. 5.
[77] Campisi, "New York-Oneida," p. 79.
[78] *See* Seneca Nation of Indians v. Christie, 126 N.Y. 122, 27 N.E. 275 (1891); United States v. Franklin County, 50 F. Supp. 152 (N.D. N.Y. 1943); St. Regis Tribe of Mohawk Indians v. State, 5 N.Y. 2d 24, 152 N.E.2d 401 (C.A.N.Y. 1958).
[79] Oneida Indian Nation v. County of Oneida, 70-CV-35 (N.D. N.Y. Nov. 9, 1971).
[80] Oneida Indian Nation v. County of Oneida, 464 F.2d 916 2d Cir. 1972)
[81] Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).
[82] Ibid., p. 670 (citations omitted).
[83] Arlinda Locklear, staff attorney, Native American Rights Fund (NARF), interview in Washington, D.C., Aug. 8, 1979 (hereafter cited as Locklear Interview).

by the 1795 treaty with New York was in violation of the Nonintercourse Act. All elements necessary to prove the claim were present, and none of the defenses of time, abandonment of the claim, or failure to join certain parties in the suit would preclude a judgment in the case.

The extent of the liability and the manner in which relief is to be fashioned still remains to be determined. At the same time, the judge in the case stressed the inability of the court to fashion an appropriate remedy and the preferability of a political solution. "The greater part of the disruption and individual hardships caused by litigation such as this could be avoided by seeking solutions through other available vehicles."[84]

Negotiations, however, have not yet begun. At first the Federal Government found it had a conflict of interest in negotiating on behalf of the Indians while it was being sued by them in the U.S. Court of Claims.[85] Once the court of claims case was decided in 1978, a schism in Oneida tribal government made negotiation virtually impossible, because the Department of the Interior did not know which of the competing factions represented the tribe. Moreover, many of the Oneidas were relocated in Canada and Wisconsin, and representatives from those reservations also had to be appointed. The Department of the Interior finally agreed that whoever would consent to meet with them would be accepted for the limited purpose of these negotiations.[86]

The tribe is also trying to get the Department of the Interior to expand the claim from about 1/4 million acres to 6 million.[87] Three documents prior to the Nonintercourse Act are proposed as the basis for invalidating land transfers that occurred before the Nonintercourse Act was passed.[88] If the Department of the Interior refuses to act in response to this argument, the Oneida Indian Nation is willing to file a claim on its own behalf.[89]

Narragansett Tribe v. Southern Rhode Island Land Development Corp.

The Narragansett Tribe claimed that 3,200 acres around Charlestown were taken by the State of Rhode Island in 1880 in violation of the Nonintercourse Act.[90] In this case the settlement process proved successful, and the judicial process never had to reach ultimate determinations. Nevertheless, preliminary litigation resulted in the articulation of legal principles that have subsequently been adopted and followed by other courts in other cases.[91] In particular, the court in *Narragansett* established the four elements that an Indian tribe must demonstrate to succeed on a claim that its land had been taken in violation of the Nonintercourse Act. The court said the four elements of a *prima facie* case which a tribe must show are that:

> 1. It is or represents an Indian "tribe" within the meaning of the Nonintercourse Act.
>
> 2. The parcels of land at issue herein are covered by the Act as tribal land.
>
> 3. The United States has never consented to the transfer of the tribal land.
>
> 4. The trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned by the United States.[92]

No single criterion can be used to prove or disprove tribal existence. Although recognition by treaty or receipt of Federal programs[93] is helpful in determining tribal status, the absence of such official recognition is not fatal.[94] In many eastern land claims, the tribes have not been recognized by treaty with the Federal Government, and yet the Nonintercourse Act may still protect their rights. The test for determing whether an aggregation of Indians is a "tribe" protected by the act has been addressed by the Supreme Court and described to mean: "a body of Indians of the same or similar race, united in a

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[84] Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 531 (N.D. N.Y. 1977).

[85] United States v. Oneida Nation of New York, 576 F.2d 870 (Ct. Cl. 1978).

[86] Locklear Interview.

[87] Ibid.

[88] See 1783 Continental Congress Proclamation, *Journals of the Continental Congress*, vol. 24 (Sept. 22, 1783), pp. 505–06; Articles of Confederation, art. IX; and Treaty of Fort Stanwix of 1784, 7 Stat. 15. This last treaty would only serve to invalidate the 1788 New York transfer if found to support a claim at all.

[89] Locklear Interview.

[90] Narragansett Tribe of Indians v. S. R.I. Land Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976). *See also*, Narragansett Tribe of Indians v. Murphy, 426 F. Supp. 132 (D.R.I. 1976) (related case involving State lands).

[91] Schagticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780 (D. Conn. 1976); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977); Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527 (N.D. N.Y. 1977).

[92] Narragansett Tribe of Indians v. S. R.I. Land Dev. Corp., 418 F. Supp. at 803.

[93] See, e.g., list of tribal entities that have a government-to-government relationship with the United States, 44 *Fed. Reg.* 7235 (Feb. 6, 1979).

[94] The necessity of Federal recognition was soundly rejected in Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 669 (1974).

community under one leadership or government and inhabiting a particular, though sometimes ill-defined, territory."[95]

The second element, showing that the land in question was intended to be protected by the act, can be proved in two ways. A tribe can establish "aboriginal or Indian title" by showing that a tribe inhabited the land in question from "time immemorial" before it ceded its holdings, or by showing that the United States has recognized the tribe's interest in certain land through a treaty or statute. The first type of proof was offered in *Narragansett,* with the Indians asserting that "since time immemorial the. . .tribe. . .exclusively owned, used and occupied" the claimed land until 1880 when Rhode Island took it over.[96] The court stated that if such allegations were established at trial, then the tribe had satisfied its burden.[97]

The methods by which a tribe can satisfy the third requirement involves showing that the United States has never consented to the land transfer. It has not been determined whether the mere approval by a Federal Commission of a State treaty would constitute consent, or whether explicit consent by the President or Congress or both is required. In any event, approval has never become an issue in a case, because no method for determining it has been found in the cases brought thus far.

Finally, the tribe must maintain that the Federal trust responsibility has never been terminated or abandoned. It is not sufficient that a State has disbanded a tribe or assumed responsibility for the tribe, as in the cases of Rhode Island, Maine, and others.[98] In *Passamaquoddy* the court said that Federal termination of the trust responsibility must be "affirmatively" demonstrated by "plain and unambiguous" evidence.

With the elements of a *prima facie* case delineated and a number of defenses disallowed, tribes have a clearer route mapped for them. The preliminary victories on procedural matters in *Narragansett* and other cases have served to spur negotiation attempts by clarifying to both sides what proof is necessary to establish a claim when faced with the relevant evidence. *Narragansett* demonstrates that where the elements can easily be met, negotiation proves a speedier and more desirable all-around solution than litigation.[99]

The Case that Failed— *Mashpee*

The action brought by the Mashpee Tribe of Wampanoag Indians to recover 13,000 acres in the town of Mashpee, Massachusetts, was a landmark case.[100] It has been the first and only outright defeat for any eastern tribe under the Nonintercourse Act and also the first time that the question of tribal definition has gone to a jury.[101]

The Indian interest in recovery of lands was sparked by two developments: Indian loss of political control of the Mashpee township and loss of access to traditional fishing areas. Both losses were caused by the influx of non-Indians to the Mashpee community in the "booming" Cape Cod land development. Leadership in the town of Mashpee, governed by a three-member board of selectmen, had been in the hands of Mashpee Indians since the town was incorporated in 1870.[102] In the 1960s, however, with the numbers of summer homes rising and real estate development booming generally, the Indian tribe became a minority in the community. In 1968 the first non-Indian was elected to the board of selectmen, and in 1972 the board's composition became two-thirds non-Indian.[103] The non-Indian population in Mashpee continued to grow. The 1970 census showed a population of 1,288 and the estimated 1976 population figures totaled 3,144.[104] Although exact racial breakdowns for these figures

[95] United States v. Candelaria, 271 U.S. 432, 442 (1976) *quoting,* Montoya v. United States, 180 U.S. 261, 266 (1901). Determination of tribal status is a question of fact. Mashpee Tribe v. Town of Mashpee, 447 F. Supp 940 (D. Mass. 1978), *aff'd sub nom.,* Mashpee Tribe v. New Seabury Corp, 592 F.2d 575 (1st Cir. 1979), *cert. denied,* 448 U.S. 866 (1979).

[96] 418 F. Supp. 798 at 807.

[97] *Id.*

[98] *Id.* at 804; Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d at 380, *aff'd,* 388 F. Supp. at 663, no. 15.

[99] See, e.g., the discussion of the Rhode Island settlement later in this chapter.

[100] Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.,* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), *cert. denied,* 48 U.S.L.W. 3205 (Oct. 1, 1979).

[101] Eastern land claims cases have relied upon Montoya v. United States, 180 U.S. 261 (1901) and United States v. Candelaria, 271 U.S. 432 (1926), for their definitions of what constitutes a tribe. In *Montoya,* the Supreme Court defined "Indian tribe" as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." Montoya v. United States, 180 U.S. at 266. The Court in *Candelaria* later adopted this definition when construing "Indian tribe" as used in the Nonintercourse Act, 25 U.S.C. §177. The novel legal issue addressed in *Mashpee* is that of voluntary abandonment of tribal status.

[102] Mashpee Tribe v. Town of Mashpee, 447 F. Supp. at 946.

[103] *Id.*

[104] U.S., Bureau of the Census, *U.S. Census of Population: 1970; Current Population Reports,* Series P25, No. 760, issued January 1979, "1976 Population Estimates and 1975 and Revised 1974 Per Capita Estimates for Cities, Incorporated Places, and Selected Minor Civil Divisions in Massachusetts."

do not exist, approximately 400 are Mashpee Indians.[105]

In order to maintain an independent tribal entity when the Mashpee Board of Selectmen fell out of tribal control, the Mashpee-Wampanoag Indian Tribal Council was incorporated in 1974.[106] Since that time, it has served as the governmental entity for the tribe and has represented the tribe in securing Federal funds.[107]

The influx of non-Indians to Mashpee resulted in a loss of access to shared areas as well as loss of political control. Even though land had been legally partitioned in 1842,[108] it remained largely open and unfenced for many years. The shore areas were accessible to everyone for fishing and recreation, but changes in the fifties and sixties brought an end to this. Cape Cod was aggressively developed by real estate interests. Individual Mashpee Indians, many of whom were relatively poor, sold off their lots. It is questionable whether those Indians who sold their holdings knew that this would entail forfeiture of hunting and fishing areas and a shrunken communal territory, complete with "no trespass" signs and high fences. As reported by an old Mashpee Indian:

> after we were given the right to sell our land, a lot of smart Boston real-estate men came down here to look things over, and in no time at all they had figured out how to cheat us. . . .Today, most of our lakefront property is owned by outsiders and the shorefront down in South Mashpee has been made into housing developments. Why, Mashpee is the only town on the whole of Cape Cod that doesn't have a public sea beach for its own residents! I guess a lot of people think it's funny how easy to fool we Indians have been about all this, but I can tell you that it's not funny to us. In fact, it eats at our hearts.[109]

The newcomers, the developers, were not always in tune with the Mashpee community:

> What's needed in Mashpee is long-range planning. . . .We're going to pull what now passes for the center of town down to the traffic circle on Route 28, and we're going to build churches, public buildings, and a shopping area for the entire section of the Cape down there. There'll be parking problems, of course, but we'll handle them with lots of pavement. . . .Our ideas reflect what modern Americans are seeking. . . .The Mashpees can go along or not. It won't make any difference.[110]

The Mashpee Jury Trial

On August 26, 1976, the Mashpee Tribe of Wampanoag Indians filed their suit against the New Seabury Corporation (a large developer), the town of Mashpee, and over 100 large landowners in the community. The town selectmen, who at first failed to take the lawsuit seriously, had by October retained a nationally prominent attorney to represent them. By the trial's end, legal fees for the town and the other defendant parties reportedly exceeded $500,000.[111]

The defendants challenged the Mashpees' assertion that they were a tribe, charging that their bloodlines were racially mixed, their "government" did not function as a political body, and they were not united in a community. The tribe viewed that attempt as "a strategy of destruction"[112] and garnered a group of historians and anthropologists to refute what it regarded as "an outrageous attack upon its identity and heritage."[113] Responding to pressure from angry homeowners, the tribe in early 1977 reduced its claim from 17,000 acres to the 13,000 undeveloped acres in the town.[114] Again in August, the tribe voluntarily amended its suit to 11,000 acres.[115]

Retired Georgia Supreme Court Justice William Gunter, the Presidential representative who started the mediation process in Maine, also studied the situation in Mashpee. After 5 months, he withdrew from the case and recommended that the question of whether the Mashpee were a tribe proceed to court.[116]

On October 17, 1977, the trial began and lasted 40 days, with 300 years of history explored by numerous experts.[117] Over 5,000 pages of testimony were generated by 52 witnesses.[118] The Native American Rights Fund reported that "the Mashpee trial is one

[105] *New York Times*, Jan. 8, 1978, p. 27.
[106] Mashpee Tribe v. Town of Mashpee, 447 F. Supp. at 947.
[107] *Id.*
[108] Each Mashpee Indian was allotted 60 acres. Land not divided was held in common in Mashpee District. *Id.* at 945.
[109] Paul Brodeur, "A Reporter at Large: The Mashpees," *New Yorker* vol. 54 (Nov. 6, 1978), p. 98.
[110] Ibid., p. 119.
[111] *New York Times*, Jan. 7, 1978, p. 1.
[112] *NARF Announcements*, p. 20.
[113] Ibid.
[114] Brodeur, "A Reporter," p. 123.
[115] Ibid., p. 126.
[116] See transcript, "Press Conference of William B. Gunter," Office of the White House Press Secretary, July 15, 1977.
[117] *New York Times*, Jan. 7, 1978, p. 1.
[118] Stacy Jolna, "Indians Defeated in First Round of Land Lawsuit," *Washington Post*, Jan. 7, 1978, p. A-1.

of the longest and most complex in which NARF has ever been involved."[119]

Historical evidence offered in the trial dated back to 1665, when Richard Bourne, a Christian missionary, wanted to gather a community of Christian Indians in the Mashpee area.[120] Twenty years later, his son, Shearjashub, insisted that the General Court of Plymouth County grant an area of land to the South Sea Indians (the Mashpees).[121] This land grant contained the restriction that no land could be sold to an Englishman without the consent of all the Indians and the permission of the General Court.[122] The land was to be held in common and could not be sold indefinitely. It was on this 1685 grant, or recognition of title, that the court said the Mashpee Tribe had to base its claim.[123]

At various times in the Mashpees' history, influxes of outsiders contributed toward a mixed race. A major instance of this was after the American Revolution, when there were reported to be 70 widows out of a population of a few hundred. Marrying into the community then were approximately 60 black males, 4 escaped Hessians, and a Portuguese sailor.[124] It was argued to the jury that because of intermarriage over 2 centuries, it would have to decide whether the Mashpees always thought themselves to be Indians, or whether they had come to consider themselves blacks.[125]

In 1834 the District of Mashpee was created. Governed substantially like a Massachusetts town, Mashpee differed in that land transactions affecting the common lands and the treasury were subject to approval by a Governor-appointed commissioner. In 1842, by statute, every person deemed a proprietor[126] was allotted a portion of the common lands to bring each person's holdings to 60 acres, but the restraint against selling lands to non-Indians remained.[127]

In 1869 the Massachusetts Legislature considered giving Indians full rights of citizenship and removing the restrictions on land transfer. Despite the fact that at a legislative hearing in Mashpee a majority of Indians failed to support the measures, the Massachusetts Legislature passed an act granting citizenship to the Indians and the right to sell land to whomever they pleased. In 1870 Mashpee was incorporated as a town and the 3,000 acres of common lands remaining after the allotments of 1842 were transferred to it along with the right to sell them. It was these two transactions, the allotments of 1842 and the transfer of comman land with the right to sell to the town, that the Indians claimed violated the Nonintercourse Act. That claim, however, was never to be litigated.

At issue at trial were the differing views of what constituted the necessary elements of tribal government. The non-Indians argued that sovereignty was the key and that the Indians lacked a separate government and an independent leadership with strong authority over tribal members. The Mashpees argued that continuing leadership could be proved by interrelated families, town governors, or tribal councils.[128] The issue of tribal existence was submitted to the jury. The jury was given the task of determining whether the Mashpees were an Indian tribe on any of the following dates: 1790, the date of the Nonintercourse Act; 1834, when the District of Mashpee was first created; 1842, when the land held in common was broken into allotments; 1869, when restrictions on alienation of land by individual Indians were lifted; 1870, when the remaining common land was transferred to the town for sale; and 1976, when the suit was filed. If the Mashpees were a tribe at the time of the pertinent transfers, the transactions would have required Federal approval in order to have validity.

The court's lengthy instructions to the jury were significant. The burden of proof was placed on the Mashpees, and the jurors were instructed that, if in doubt on any particular issue, they were to find for the other parties.[129] The court explained its reasons for requiring the Indians to meet a difficult burden of proof in its March 24, 1978, opinion:

> The standards of that Act [Nonintercourse Act], at least as I have interpreted it, require that a tribe demonstrate a definite organization before it can qualify for the extraordinary

[119] Native American Rights Fund, *Annual Report* (1977), p. 49.
[120] Mashpee Tribe v. Town of Mashpee, 447 F. Supp. at 944.
[121] *Id.*
[122] Plaintiff's exhibit 38, quoted in Mashpee, 447 F. Supp. at 944.
[123] *Id.*
[124] *Id.*
[125] Brodeur, "A Reporter," p. 127. This stress on racial intermarriage led some critics to charge James D. St. Clair with pursuing a racist strategy. Ibid., p. 129.
[126] In 1723 Mashpee had been organized as a permanent proprietary Indian plantation. *Id.* at 945.
[127] Mashpee Tribe v. Town of Mashpee, 447 F. Supp. at 945.
[128] Brodeur, "A Reporter," p. 128.
[129] Mashpee, 447 F. Supp. at 950 n.7, *aff'd.* 595 F.2d at 588–90.

> remedy of the total voiding of land titles acquired in good faith and without fraud.[130]

After 21 hours of deliberations, on January 6, 1978, the jury decided that the Mashpees were a tribe in 1834 and 1842 but not on any of the other dates. The court subsequently, after motions, sustained the jury's verdict[131] and dismissed the Mashpees' suit. The First Circuit Court of Appeals affirmed the district court,[132] and the U.S. Supreme Court declined review.[133]

The immediate reaction to the jury verdict was a sigh of relief among landowners but a sense of unfairness among Indians. Mashpees, who grew up thinking they were Indians, reportedly were upset when 12 non-Indians in Boston (the jury) declared that they were no longer a tribe.[134] Russell Peters, president of the tribal council, described the political factor and the standard used in the case:

> They [the jury] and the judge had to find against us from a political standpoint because the remedy of giving back the land was too harsh. Judge Skinner set very difficult criteria for tribal existence, criteria that would be difficult for many of the Western tribes to meet.[135]

The town felt the effects of the struggle, which the trial heightened. Kevin O'Connell, chairman of the board of selectmen, expressed his pleasure with the "legal victory" but added, "There is no social victory because we have a community that is torn apart."[136] Robert Maxim, the sole Indian on the board of selectmen, said he felt relief that the trial was over but expected strong feelings to continue.[137]

Other Asserted Claims

At least seven other claims have been asserted under the Nonintercourse Act, involving from 350 acres to over 140,000 acres of land. These claims are in varying stages and most are attempting negotiation as an alternative to protracted litigation.

Gay Head, Massachusetts

The Gay Head Indians, like the Mashpees, are part of the larger Wampanoag Indian Confederacy. Their claim in the small town of Gay Head (population 118) on Martha's Vineyard originally included only the 150 to 200 acres of common land but was enlarged to include 150 to 200 extra acres of private land. Their potential claim could cover all of the town of 3,600 acres.[138]

No suit has been filed in the Gay Head case, and a dean of Harvard Law School has been serving as mediator since 1977 in the hope of reaching a negotiated settlement. With the high costs of litigation,[139] a settlement could end by costing the town less than a full defense of the case. The town voted to return a 243-acre parcel in December 1976, but the tranfer requires State legislation before it can be finalized. The Gay Head Taxpayers' Association has opposed the legislation until there is a settlement on the question of all the land. Meanwhile, negotiations continue.[140]

Two Connecticut Cases

Two land cases have been brought by tribes in Connecticut, one for 1,300 acres and the other for 1,000 acres. Both were brought by tribes suing on their own behalf (not the Federal Government) and represented by Native American Rights Fund attorneys. The first, involving the Schaghticoke Tribe of Indians, is still in the early stages of litigation.[141] The U.S. district court refused to let one of the current non-Indian leaseholders argue the case on the grounds of the defenses of time, namely, laches, statute of limitations, and adverse possession.[142] The only defense argument permitted by the court relies on events predating the 1790 Nonintercourse Act. This case, as well as the other Connecticut case,

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[130] *Id.*

[131] Mashpee, 447 F. Supp. at 950. The court determined that only 1976, 1842, and 1870 were relevant dates.

[132] Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979).

[133] Town of Mashpee v. Mashpee Tribe, 444 U.S. 866 (1979).

[134] *New York Times*, Jan. 8, 1978, p. 27. A similar judgment was made in New York regarding the Shinnecock Indians, even prior to litigation. In September 1979 Solicitor Krulitz denied a request to bring a lawsuit for the tribe to recover 3,200 acres of land, due in part to what he considered significant intermarriage, which resulted in the Federal Government not recognizing the Shinnecocks as a tribe. The tribe, however, still has the option of suing on its own behalf or attempting negotiation. Mark McIntyre, "U.S. Backs Away From Shinnecocks' Suit," *Newsday*, Sept. 5, 1979, p. 19.

[135] Michael Knight, "Land Suit of Indians Dismissed by Judge," *New York Times*, Mar. 25, 1978, p. 6.

[136] *New York Times*, Jan. 7, 1978, p. 1.

[137] Ibid., Jan. 8, 1978, p. 27.

[138] *NARF Announcements*, p. 19.

[139] E.g., over $500,000 in legal fees was reportedly spent by the town and other defendant parties in the *Mashpee* case. *New York Times*, Jan. 7, 1978, p. 1.

[140] *NARF Announcements*, p. 19.

[141] Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780 (D. Conn. 1976).

[142] *Id.* at 780, 786. Other parties holding land in question are the town of Kent, Connecticut Light & Power Co., and a couple of private citizens.

closely parallels the *Narragansett* case in Rhode Island decided 6 months earlier.[143] Consequently, with fewer issues to handle and the burden of the parties more narrowly defined, a trial may be speedier and incentives for negotiation more apparent. No further court action has occurred in this case and negotiation continues.

The second Connecticut case, brought by the Western Pequot Tribe, involves a claim to approximately 1,000 acres in Ledyard (population 14,558).[144] Not only are the tribe's attorneys and the judge the same as in the Schaghticoke case,[145] but the same defenses of time were raised and the Indians' attorneys asked the court to disallow them.[146] A further argument, advanced by the present landholder, was that claims brought under the Nonintercourse Act could only be brought by the United States.[147] There has been no decision to date.

New York Claims

In actions that have attracted very little national publicity, two New York tribes, the Cayugas and the St. Regis (Akwesasne) Mohawks, have also filed claims.[148] Based on lengthy title searches, the two tribes have identified 12,000 landowners affected by the Cayuga claim and 6,500 to 7,000 affected by the Mohawk claim. Their names, addresses, and property descriptions were computerized, enabling the tribe to prepare quickly for ejectment suits against the 19,000 individual landholders if statute of limitations problems arise.[149]

A tentative settlement, announced by Interior Solicitor Leo Krulitz on August 20, 1979, would give the Cayuga Indian Nation a 5,481-acre reservation and an $8 million trust fund in return for extinguishing the claim.[150] The agreement was worked out among the tribe, the State of New York, and the U.S. Departments of Agriculture and the Interior. Congressional approval of the tentative settlement will be required.

The Cayugas and St. Regis Mohawks claims each have a unique history.

Cayuga Indian Nation

The Cayuga Indian Nation, now a landless tribe, has claimed that 64,000 acres (100 square miles) were taken from them by New York State without Federal approval. As a member of the powerful alliance, the Six Nations of the Iroquois, most Cayugas sided with the British in the American Revolution. In 1789, however, New York State made a treaty directly with the tribe, recognizing their title to 64,000 acres. Six years later (and after the passage of the Nonintercourse Act) the Federal Government acknowledged and confirmed the New York treaty in the Treaty with the Six Nations.[151] The tribe thus bases its claim upon recognized title, which is entitled to all the fifth amendment protections of just compensation, unlike aboriginal or Indian title, which affords less protections and is exclusively the type claimed in Maine and most other Eastern States.[152]

In two transactions, in 1795 and in 1807, New York State regained without Federal approval the lands it had recognized as the Cayugas'.[153] Simultaneously, New York commenced a series of removals of the Cayugas. A portion of the original tribe still exists today in Oklahoma and is recognized as the Seneca-Cayuga Tribe.[154] These Indians are not included in the settlement talks, however, but have received a portion of a New York trust fund in an earlier action brought in the U.S. Court of Claims.[155]

The Department of the Interior, having studied the case and the other New York claims for several years, recommended to the Justice Department in

[143] Narragansett Tribe of Indians v. S. R.I. Land Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976).
[144] Western Pequot Tribe of Indians v. Holdridge Enterprises, Inc., Civil No. 76-193 (D. Conn.)
[145] I.e., Native American Rights Fund attorneys and Judge M. Joseph Blumenfeld.
[146] See Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. at 783, n. 2.
[147] *NARF Announcements*, p. 21.
[148] Arthur Gajarsa, interview in Washington, D.C., Aug. 15, 1979 (hereafter cited as Gajarsa Interview).
[149] Ibid. Attorney General Griffin Bell had said that the Department of Justice would not sue any private landowners but only the State of New York.
[150] U.S., Department of the Interior, news release, "Tentative Agreement Reached on Cayuga Indian New York Claim," Aug. 20, 1979.
[151] 7 Stat. 44 (1794).
[152] See the classic case of Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), which enunciated the requirement of formal sovereign recognition for fifth amendment compensability. Thus the difference between the Cayuga claim and the claim in Maine is that Congress could not extinguish the Cayuga claim unless it provided just compensation at the fair market value for the land, while no such restriction exists in Maine. See also, Daniel G. Kelly, Jr., "Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial," *Columbia Law Review*, vol. 75 (1975), p. 655.
[153] Gajarsa Interview.
[154] 44 *Fed. Reg.* 7236 (Feb. 6, 1979).
[155] Cayuga Nation v. United States, Docket 434, 36 Ind. Cl. Comm. 75 (1975), 41 Ind. Cl. Comm. 308 (1978) (approval of a compromise settlement). The 1975 opinion of the Indian Claims Commission was important for establishing the principle that an obligation of the Federal Goverment exists despite the fact that the tribe sided with the British in the American Revolution.

June 1977 that suits be brought by the Federal Government on behalf of the tribes.[156] The Justice Department agreed to commence the suits before the statute of limitations was to expire in August 1977. Congress subsequently extended the time period for bringing land claim suits to April 1980.[157] Thus, with more time available for settlement talks, no lawsuits for either the Cayugas or the St. Regis Mohawks have been filed in court. The Department of the Interior will not recommend litigation and neither will the tribe file lawsuits as long as some hope remains alive for another alternative.[158]

St. Regis (Akwesasne) Mohawk Indians

The St. Regis Mohawk Tribe came into being at the St. Regis Jesuit Mission as a conglomerate of converted Roman Catholics and elements of non-Christian Mohawk groups.[159] The tribe was a member of the "League of Seven Nations," an alliance united to offset the "Six Iroquois Nations." In 1796 the tribe was recognized by treaty with New York State and granted a reservation of 28,000 acres.[160] This treaty was ratified by the Federal Government and thus, as with the Cayugas, gave rise to a fifth amendment compensation claim.

Between 1816 and 1845 the reservation was diminished in size by 15,000 acres without U.S approval. Due to a boundary change with Canada, two islands were transferred in 1822 to the United States—Barhart Island and Long Sue Island. The Mohawks also claim the 3,000 acres of flooded islands (complete with the gigantic St. Lawrence Power Project) under aboriginal title, since no treaty was involved and the tribe never relinquished its rights when the land changed flags.[161]

Between 1928 and 1958, three cases were brought by the tribe, but none was successful.[162] In all three cases the courts rejected the claims of the St. Regis Mohawks on the basis of legal theories[163] that the Supreme Court of the United States has subsequently declared to be no longer tenable.[164]

State officials, dubious before, are now seriously scrutinizing the claims. As Jeremiah Jochnowitz, assistant New York attorney general for Indian cases, described it, "These cases would be laughed out of court if they were brought 30 years ago, but the temper of the times has changed."[165] The various tribes and their attorneys are well aware of the temper of the times and are moving towards settlements.

South Carolina's Catawba Tribe

The 1,200-member Catawba Tribe has a long, continuing history of asserting its claim to 144,000 acres of land it once owned. Since 1904 the tribe has sought Federal assistance to bring its claim.[166]

Prior to the American Revolution, the Catawba were secured in a 15-mile square, 144,000-acre reservation through the Treaty of Augusta with the British Crown.[167] When the United States took over Great Britain's sovereignty after the Revolutionary War, the new government did not abrogate the earlier British treaty. Solicitor Krulitz of the Department of the Interior in a recent announcement thus concluded, "the Catawbas retained a vested right in their reservation."[168]

Following a series of encroachments, the State of South Carolina acted to extinguish Indian title to the 144,000-acre reservation by approving the Treaty of Nation Ford in 1840.[169] The treaty was signed, ratified, and confirmed without the Federal approval required by the Nonintercourse Act. In two later actions, the State repurchased parcels of land as a home for the Catawbas, which amounted to 4,000 acres.[170]

In the early 1900s, the Catawba Tribe petitioned the United States for assistance in restoring its reservation or payment for its loss. In 1909 the Commissioner of Indian Affairs denied the petition because the Department of the Interior viewed the tribe as "State Indians," as opposed to federally-recognized Indians, notwithstanding the fact that

[156] U.S., Department of the Interior, news release, "Interior Asks Department of Justice to Bring Suits in Support of Indian Claims in New York State," July 1, 1977.
[157] Statute of Limitations—Indian Claims, 28 U.S.C. §2415 (1977).
[158] Legislative attempts at implementing a proposed settlement agreed to by the tribe and the Department of the Interior, H.R. 6631 (96th Cong., 2nd sess.), were not successful. The matter is now pending in litigation.
[159] Gajarsa Interview.
[160] Ibid.
[161] Ibid.
[162] Deere v. State of New York, 22 F.2d 851 (N.D. N.Y. 1927); United States v. Franklin County, 50 F. Supp. 152 (N.D. N.Y. 1943); St. Regis Tribe of Mohawk Indians v. State, 152 N.E.2d 411 (C.A.N.Y. 1958).
[163] St. Regis Tribe of Mohawk Indians v. State, at 419.
[164] Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974).
[165] Harold Faber, "Indian Land Claims Put to Negotiators," *New York Times*, Jan. 1, 1978, p. 20.
[166] U.S., Department of the Interior, news release, "Interior Asks Justice Department to Begin Legal Action in Support of Land Claims of Catawba Indians in South Carolina," Aug. 30, 1977.
[167] Treaty of August 1763, Catawba Indian Tribe-Great Britain. An earlier treaty, the 1760 Treaty of Pine Tree Hill, established the same result but no copy of the treaty is available. See *NARF Announcements*, pp. 16–17.
[168] U.S., Department of the Interior, news release, Aug. 30, 1977 (hereafter cited as DOI News Release).
[169] *NARF Announcements*, p. 17.
[170] Ibid.

Congress had acknowledged the Catawba Tribe in 1848 and 1854.[171]

On August 30, 1977, Interior Solicitor Krulitz announced that the Department would recommend a suit to recover the tribe's 140,000 acres if a settlement could not be reached. With the threat of litigation in hand, Solicitor Krulitz wrote to the Justice Department, "We would prefer an amicable, orderly settlement to lengthy, disruptive litigation, and will lend immediate assistance in negotiations for a just and model settlement."[172]

Negotiations have proceeded for over 2 years, and both the tribe and the State attorney general agree that an out-of-court settlement is likely. However, the various groups involved have not yet been able to agree on settlement figures. Within the tribe, some members are intent on receiving land while others seek a cash award, to be distributed on a per capita basis.

Despite the disagreements over awards, the spirit of conciliation of all parties is apparent. The area's Representative, Kenneth Holland (D–S.C.), who is largely responsible for getting the sides together, remarked:

> We started to view the consequences, we saw how explosive it could be, and we were able to get the confidence of everybody. What strikes me about the way things have gotten up in Maine is that people reacted in a purely political fashion. Perhaps if they had acted reasonably and in a conciliatory way, there wouldn't be unrest there now.[173]

Representative Holland, prior to a negotiatiated settlement, introduced a bill, the "Catawba Settlement Act,"[174] that would cut off the claim in return for "full, just, and adequate compensation."[175] The bill leaves open the details of a settlement plan, however, authorizing the Secretary of the Interior to develop a plan, subject to the approval of the Catawba Tribe.[176] A full hearing was held on June 12, 1979, before the Committee on Interior and Insular Affairs.[177]

Reaction to the Claims

When it became apparent to the non-Indian public that Indian land claims were not simply an abstraction but a reality, the initial reaction was extreme. Political figures filled the media with prophecies of doom. Dire economic consequences were predicted and, given the non-Indian general ignorance of all things Indian, it probably was not surprising that a period of shock followed the initial recognition that the claims were real.

One of the most quoted speeches about eastern land claims was delivered by Representative William Cohen (R–Maine) on March 1, 1977, when he introduced a bill to extinguish Indian title in Maine. Dubbed the "dark cloud speech" for its meteorological metaphor, the speech included the following:

> A dark cloud of doubt and instability is hovering over the State of Maine as a result of a lawsuit brought by the Passamaquoddy and Penobscot Indian Tribes against the State. . . .
>
> [T]he very pendency of the suit threatens to bring the State of Maine to its knees. If the Justice Department proceeds to seek a return of the land, local municipalities in the disputed land areas will have difficulty issuing bonds to finance capital construction programs; banks will no longer finance home loans and mortgages; investment and commercial development will be terminated; and the flow of Federal dollars into programs such as FMHA, SBA, and EDA may be restricted. The central nervous system of the municipalities could not survive this act of financial anoxia. Already there is a revolt beginning among the non-Indian citizens who threaten to withhold payment of taxes and mortgages pending a resolution of this controversy. This, of course, will only exacerbate the financial pressure now being exerted on local communities.[178]

Maine's attorney general, Joseph Brennan, in a similar vein wrote to the Maine Legislature and sounded the following cry of alarm:

> Because of the economic problems created by the pending claims, some people have suggested that we should negotiate with the Tribes. . . .The only purpose that I can see in negotiations would be to discuss the possible payment of state lands or monies to the Tribe. I believe it would be wrong to compromise this claim in that way. I believe it would be wrong

[171] Ibid.
[172] DOI News Release.
[173] Peter Kovler, "Native American Land Rights," *Current*, no. 204 (July/August 1978), p. 19.
[174] H.R. 3274, 96th Cong., 1st sess. (Mar. 27, 1979).
[175] Ibid., §2(a).
[176] A draft settlement proposal was produced in July 1980; however, it was rejected by the full legislative committee in October 1980. Suit was filed by the tribe.
[177] Ibid., §2(b).
[178] 123 *Cong. Rec.* H1533 (daily ed. Mar. 1, 1977)(remarks of Rep. Cohen).

> to settle a case about which we feel so strongly simply because the Tribes, backed by the resources of the Federal Government, are in a position to bring great financial pressure to bear on the state.[179]

Maine's largest newspaper, the *Bangor Daily News*, took a similar view in an editorial on the Maine claim. "Unless this country is prepared to destroy itself in the name of justice," the Bangor paper warned, "it is madness to foresee 1,500 or so Maine citizens, of any color, creed or ancestral origin, getting 10 or 12 million acres of land and billions of dollars. . . .If Maine's Indian case has merit, then. . .no land in any state in the country is safe."[180] Inserting the editorial in the *Congressional Record*, Representative Cohen said that it "well represented public opinion in Maine."[181]

Attempts by the Maine tribes to minimize the potential effects of the suit were viewed as unsatisfactory by the *Bangor Daily News:*

> Token gestures such as reducing the amount of acreage sought are of little value. The principle is the same. Nor does the Indians' offer to steer clear of the "small landowner" have any true comfort or redeeming value. If you can take land or tribute from the large landowners, it is only a matter of time before you can take it, much easier in fact, from the small landowners who won't have the means to defend themselves except in numbers and force.[182]

One of the harshest criticisms of the Indian land claims appeared in a *Time* magazine essay under the loaded question, "Should We Give the U.S. Back to the Indians?"[183] The following excerpts reflect the biases of generations:

> • They are on a warpath of sorts again, armed this time with old treaties and new court writs and led by sharpshooting lawyers;
>
> • Mashpee, Mass., one besieged town;
>
> • After so many quiet years what got into the Indians?. . .Indian nationalism. . .new assertiveness. . .fundamental new strategy. . .the ongoing legal offensive. . .part of a spirit. . .the Indian Renaissance. . .the size of the offensive is striking.[184]

Time only briefly mentioned the legal basis for the claims and the fact that the Justice Department had concluded in several instances that the Indians have a solid case in law. The article, however, viewed potential court decisions that would turn over land as "the unthinkable unraveling of society," "the inherent absurdity," and "the impossible rolling back of history."[185]

Community spirit and cooperation were deeply wounded by the persistent racism exhibited in the land claim areas. Senator Edward Brooke (R–Mass.), knowing firsthand the problems in Mashpee, a town of fewer than 5,000 people, commented in a congressional hearing:

> It [Mashpee] was, and it is, a very wonderful cape town. They are very warm and beautiful people, but racism has crept into this town as a result of this. . . .I think it is a credit to both sides that it hasn't expanded more that it has so far.
>
> Racism has also had an economic impact in that there has been an economic retaliation in certain instances on both sides as a result of these claims. [P]roperty rights are important but human rights are still more important. . . .
>
> As long as we deny the people who have that right and bought that land the right to sell that land and repair that land—or do anything with it—the business of racism will do nothing but increase and fester.
>
> It is a problem.[186]

Landowners in several States united to oppose the land claims. In Mashpee, for example, two groups formed—one that favored a negotiated settlement and one that strongly opposed the suit. The latter, the Mashpee Action Committee (MAC), which received support from the Interstate Congress for Equal Rights and Responsibilities (ICERR), was organized in 1976.

One of the prime issues of the ICERR became what it called "Indian land grabs." Leaders of the group said that their efforts "could make Mashpee as

[179] Attorney General Joseph Brennan, "Memorandum to the Members of the Maine Legislature" (Augusta, Me., Feb. 18, 1977), p. 8, reprinted in 123 *Cong. Rec.* S3206, S3208 (daily ed. Mar. 1, 1977).
[180] *Bangor Daily News*, Mar. 2, 1977, reprinted in 123 *Cong. Rec.* E1481–E1482 (daily ed. Mar. 15, 1977).
[181] 123 *Cong. Rec.* E1481 (daily ed. Mar. 15, 1977) (remarks of Rep. Cohen).
[182] *Bangor Daily News*, Mar. 2, 1977.
[183] Frank Trippett, "Should We Give the U.S. Back to the Indians?" *Time*, vol. 109 (Apr. 11, 1977), p. 51.
[184] Ibid.
[185] Ibid., p. 52.
[186] U.S., Congress, Senate, Select Committee on Indian Affairs, *Mashpee Lands: Hearing on S.J. Res. 86*, 95th Cong., 1st sess., 1977, p. 39.

important for civil rights as the Little Rock civil rights conflict of the 1950s."[187] It was an odd analogy to make, equating their position in relation to the Indian land claims with that of black citizens in the Little Rock crisis. In the case at hand, white citizens were asking the Federal Government to support the white majority in its efforts to oppose Indians, who are clearly the numerical, political, and racial minority. An article in *The Nation* criticized this type of thinking in the following comment:

> The fact that a legal vindication of Indian land claims may be unfair to non-Indians is a proper cause of concern, although Indians may be left to wonder why discussion of their cases concentrates almost exclusively on the real or imagined hardship in store for non-Indians.
>
> It is this one-sided approach and its corollary disregard for the longstanding and very real economic and social plight of Native Americans that has been used to justify the distorted and punitive anti-Indian rights legislation now before Congress.[188]

Some Indian tribes who had filed land claims were denied public services. Oneida, New York, allegedly responded to the suit of the Oneida Indians by cutting off police and fire protection to an existing 32 acres of Indian land.[189]

In Maine, Indians who would otherwise qualify for financing from the Veterans Administration on home improvements or mortgages allegedly could not get funds because of the land claim.[190] Even though Micmac and Maliseet Indians (constituting about one-half of the Indian population in the State) had not been involved in the Maine claims, they met the same hardships as the Passamaquoddy and Penobscot Indians.

All Indian tribes in Maine were excluded from the 1980 Maine budget (effective July 1, 1980). The Governor's explanation for the drop from $1.7 million to zero was that Federal monies would be coming into the State of Maine by 1980, and services currently provided by the State's Department of Indian Affairs would be picked up by the Federal Government.[191] As federally-nonrecognized tribes who were not likely to be a part of a Maine settlement, Micmacs and Maliseets believe they are being unfairly treated.

Before the suit was filed, Indians and non-Indians in Mashpee had interacted. After the suit was filed, Indians tended to stay in the northern part of the town and whites clustered in the southern part.[192] At least one Indian-owned business was openly boycotted by non-Indians.[193] On one occasion, two to three dozen policemen routed an Indian youth camp-out and sent 12 young people to jail. All the youths were later acquitted. Mashpee Indians are convinced that the incident was an open attempt to intimidate them into dropping their lawsuit.[194]

Actual Economic Effect

Economic problems related to the lawsuit in Maine first surfaced when a prominent law firm refused to give an unqualified legal opinion as to the security of a $1 million bond issue proposed by Millinocket, a city in the heart of the claims area. Shortly thereafter, the Maine State treasurer announced the delay of a $27 million issue by the Maine Municipal Bond Bank on behalf of towns, schools, and hospitals both inside and outside the claims area.[195]

The land ownership dispute was perceived as threatening to the bond market because it raised questions about the ability of local and State governments to tax property, since it is the availability of such revenues that guarantees government bonds. If the tribes are successful in regaining lands, title will be transferred to the Federal Government in trust for the tribes and no State or local taxes will be received from the property.[196] Additionally, lending institutions that retain property as security for repayment of debts are less likely to bear the risk of nonpayment if ownership is uncertain.

Maine's Governor James Longley responded to the bond crisis by seeking help from the congressional delegation and from the Department of the

[187] *Wassaja* (published by the American Indian Historical Society). May 1977.
[188] P[illegible]a Shattuck and Jill Norgren, "Indian Rights: The Cost of Justice," *Natio[illegible]* vol. 227 (July 22–29, 1978), p. 71.
[189] Gumpert, "Indian Land," p. 17.
[190] Barbara Namias, testimony, *Hearing Before the U.S. Commission on Civil Rights, Washington, D.C.*, Mar. 19–20, 1979, pp. 34–35 (hereafter cited as *Washington, D.C., Hearing*).
[191] Ibid., p. 36.
[192] Gumpert, "Indian Land," p. 17.
[193] *Report from Mashpee: A Study of the Impact of the Wampanoag Land Claim on the Economy of Mashpee, Mashachusetts* (Philadelphia: published by the American Friends Service Committee, July 1978), p. 12 (hereafter cited as *Report from Mashpee*).
[194] Brodeur, "A Reporter," p. 123.
[195] McLaughlin, "Giving It Back," p. 71; *New York Times*, Sept. 30, 1976, p. 16.
[196] In parts of the country where trust land is located, the local tax loss is often offset with Federal payments, particularly through P.L. 874 and P.L. 875 (Impact Aid for Education) and/or offset by the substantial benefit to the local economy (sales taxes) usually provided by Indian and Federal spending.

Interior. Members of the Maine delegation asked the Farmers Home Administration Administrator to continue loans to Maine lands clouded by the Indian land claims.[197] Shortly thereafter, the Assistant Secretary of the Treasury notified Governor Longley that programs of the Farmers Home Administration and also those of the Small Business Administration and the Economic Development Administration would not be adversely affected.[198] Maine's treasurer predicted that the backing of Federal monetary policy agencies would have "a calming effect on the financial community."[199] The Maine congressional delegation also announced plans to introduce legislation to pledge Federal backing to guarantee the State's credit and to limit the claims to a monetary settlement.[200]

Five months after the September crisis in Millinocket, bond sales resumed. In February 1977, rating agencies gave Maine's bonds very good ratings and underwriting groups proceeded to bid on the bonds.[201] Although the interest rate was somewhat higher, dealers hesitated to estimate exactly how much.[202] Investors also showed some reservation toward the new issues on the first day of trade. But a half year later, investor confidence in Maine securities seemed assured. Maine Housing Authority bonds totaling $19.3 million were sold despite the fact that about half the proceeds were earmarked for the claims area.[203]

The Maine tribes, interested in the overall effects of their suit, commissioned a financial effects report in 1978. The investment consultant hired by the tribes predicted that, if the settlement recommended by the three-member White House study group were adopted, tribal investments would produce over 5,800 new jobs, 88 percent of which would be filled by non-Indians. The report[204] also estimated that $2.4 million in new tax revenues would enter the Maine coffers from tribal investments. This sum would be offset by the $375,000 then provided in property taxes in the area under discussion for the potential settlement.[205] This study was prepared for the tribes to determine if the amount of money could make a significant long term improvement in their economic condition and also have a favorable effect on the non-Indian population and upon the State itself. The preliminary report predicted positive effects on all three groups, thus helping to calm the atmosphere surrounding the claims.[206]

Despite the excited political rhetoric and headlines about the economic effect of the suit in Maine, some local officials did not appear to have the same level of concern about the outcome. Millinocket's town manager put it this way:

> There's been no impact whatsoever from the suit here, and just a little inconvenience in the form of a slightly delayed bond issue. I really don't think anybody is overly alarmed. You'll find that our Yankee philosophy is one of pragmatism—and wait and see.[207]

In Massachusetts a study conducted by the American Friends Service Committee sought to separate fact from fiction in the Mashpee claim. Descriptions of economic conditions in Mashpee were collected from a number of civic leaders. A few of those quotes illustrate the fervor with which the claims were received:

- Selectman O'Connell, referring to Mashpee people: "the mental anguish these people are going through." (*Cape Cod Times,* Feb. 28, 1977) "Mashpee is perhaps the most economically depressed town in the Commonwealth." (*Falmouth Enterprise,* Sept. 30, 1977)
- William Clendenin, town assessor and president, Mashpee Action Committee: "It's killed the economy. The town has the highest unemployment rate in the Commonwealth. There are no mortgages, no building, no federal grants." (*Cape Cod Times,* Oct. 17, 1977)
- Senator Brooke (R–Mass.) and Representative Gerry E. Studds (D–Mass.), in a telegram to Vernon Weaver, head of the Small Business Administration (SBA): ". . .unimaginable economic hardship for nearly an entire year." (*Cape Cod Times,* July 28, 1977)
- Town attorney Stephen Olesky at a U.S. Senate hearing in October 1977: "Real property transactions are at a standstill. Mortgages cannot be obtained and property, therefore, cannot be

[197] Maine Congressional Delegation, press release, Oct. 22, 1976.
[198] *New York Times,* Oct. 26, 1976, p. 20.
[199] Ibid.
[200] Ibid., Feb. 10, 1977, p. 18.
[201] Ibid., Feb. 26, 1977, p. 28.
[202] Ibid.
[203] Ibid., Aug. 4, 1977, p. A–14.
[204] Alan Patricof Associates, *Preliminary Analysis of Certain Potential Economic Consequences of a Settlement of the Passamaquoddy and Penobscot Claims* (release by the Passamaquoddy and Penobscot Indian Tribes, Feb. 16, 1978).
[205] Ibid.
[206] Ibid.
[207] "If Indian Tribes Win Legal War to Regain Half of Maine," *U.S. News & World Report,* vol. 82 (Apr. 4, 1977), p. 54.

sold for an amount even remotely approximating its fair market value prior to the institution of the lawsuit. In many instances, property owners have responded to the decreases in marketability in their titles and interests by refusing to pay their real property *ad valorem* taxes. . . .The Town of Mashpee is rapidly approaching a financial crisis of disastrous proportions." (Mashpee Lands Hearing, before the Senate Select Committee on Indian Affairs, Oct. 21, 1977, p. 59)[208]

The "gloom and doom" forecasts did not materialize. Through a systematic series of interviews, the American Friends Service Committee gleaned the following information:

- Construction industry: Home construction was down about 90 percent but up in neighboring towns. (p. 8)

- Unemployment: Although official statistics were unavailable, interviews indicated that while there were some serious problems of unemployment in the first six months of the suit, most people found jobs in the surrounding area, in a similar manner as the construction industry. (p. 16)

- Banks: No problem was found with foreclosures and no bankruptcies were found that were suit-related; however, in general no new mortgages were being given. (p. 9)

- Development: Developers were hard hit but not all the developers were in perfect financial health before the suit. Hardship was somewhat related to size and diversification of developers. (p. 11)

- Realtors and builders: Those who were not also developers could go where the construction was, and found a good deal of work available in surrounding towns. (pp. 11–12)

- Other businesses: The majority lost little or no business. Twelve businesses opened and 12 closed since the suit commenced. (pp. 13, 15)

- Personal hardships: Thirty-four persons, including 15 senior citizens, wanted to sell their homes but could not. Those cases represented .8 percent of Mashpee's population. (p. 18)

- Town finances: The township was in trouble, but the difficulties could be traced to other reasons, namely the enormous growth in population needing schools and other services, and the fact that Mashpee lacks a commercial tax base comparable in size to that of nearby towns. Additionally, by legally contesting the suit, the town paid out over $500,000 for legal fees. (p. 19)[209]

In short, the American Friends Service Committee found that the effect of the suit was selective. The great majority of individuals and businesses felt little if any effect. Unemployment appeared to be no higher than normal. The development industry, however, was burdened by the uncertainty of ownership. The town's finances were affected by the large amount of legal fees and other expenses of the suit and by withheld taxes.[210]

The report cited another study by the Massachusetts Department of Community Affairs which concluded that planned and controlled growth was essential for Mashpee, especially because it lacks an industrial or large-scale commercial tax base.[211] The suit, by checking rapid uncoordinated growth, had the collateral effect of offering the town a chance to analyze the growth in the community, according to the authors of the State study.[212]

The tribes and others involved in the land claims have viewed the initial panic and fear as a necessary step in having the claims taken seriously. One guest editorialist in the *Bangor Daily News* attempted to describe this:

> [W]e non-Indians would not be lifting a finger for the tribes now, had not the Penobscots and Passamaquoddies found a way to hold a legal shotgun to our head. Let's not fool ourselves. We in Maine and Washington aren't moved by any moral fervor, but only by the implications of lawsuit, loss of land and potential economic chaos.
>
> Many politicians and editorial writers seem to play on people's fears, and on potential economic problems of a land claims suit. Fear is a low common denominator, and a questionable motive for action of any kind. And are economic problems more important than equality and justice?[213]

[208] Reprinted in *Report from Mashpee*, pp. 5–6, 9.
[209] Ibid.
[210] Ibid., p. 23.
[211] Massachusetts Department of Community Affairs, Office of Local Assistance, *Developing a Land Use Management Process: Case Study, Mashpee, Mass.* (Local Assistance Series No. 4, December 1975), quoted in *Report from Mashpee*, p. 25.
[212] Ibid.
[213] Steven Cartwright (*Wabanaki Alliance* editor), "Fair Shake," *Bangor Daily News*, Mar. 2, 1978.

In the *Oneida* test case in 1977, the Federal district court also noted the potential economic realities if the parties refused to settle out of court and then stated the reasons why a political solution was preferable to a final court determination:

> The potential for disruption in the real estate market is obvious and is already being felt. News reports indicate that title companies have refused to insure titles in areas where Indian land claims exist, even if law suits have not yet been commenced.
>
> The greater part of the disruption and individual hardships caused by litigation such as this could be avoided by seeking solutions through other available vehicles. This in no way is intended to be critical of the plaintiff's conduct. The trial of this case demonstrated that they have patiently for many years sought a remedy by other means—but to no avail. The aid of the United States as a guardian has been sought for the purpose of instituting claims against the State of New York, to challenge not only the 1795 sale but other treaties with the state. The remedy afforded by Congress against the United States for alleged breach of trust has been and is presently being pursued before the Indian Claims Commission. Finally, it is within the power of Congress to dispose of the matter under the constitutional delegation of power.
>
> The aptness of what was recently said by Chief Judge Kaufman is striking. "As in so many cases in which a political solution is preferable, the parties find themselves in a court of law."[214]

Attempts to Cut Off Claims

An angry constituency will attempt to translate its concerns into legislative action. It is not surprising, therefore, that the Congress would become one of the arenas in which land claims would be fought. One of the first congressional battles concerning the claims was the effort to extinguish Indian land claims.

Attempts were made to cut off the Maine, Massachusetts, and New York claims. The measures were regarded unsympathetically by chairmen of the pertinent congressional committees. It is doubtful that, if passed by Congress, any such extinguishment legislation would have received the endorsement of the executive branch, thus making a Presidential veto likely. Meanwhile, as negotiations have progressed in a number of States, a consensus has formed that any legislative solution of Indian land claims should await a final negotiated settlement.

Maine Extinguishment Bills

Maine was the first State for which extinguishment legislation was introduced in Congress.[215] Originally both the House and Senate bills were to be introduced in February 1977. At the request of the Carter administration, they were forestalled. Two related developments occurred in late February. The Department of Justice reduced the size of the claim (to affect 90,000 non-Indians instead of 350,000), and President Carter decided to name a special representative to help reach an out-of-court solution.[216]

Amid the panic accompanying the clouded titles and the requests for legislation by Maine officials,[217] the Maine congressional delegation agreed to act. On February 9, 1977, the delegation announced that it would submit legislation to pledge Federal backing of the State's credit and to limit the Maine claims to a monetary settlement.[218]

On March 1 Representative William S. Cohen (R–Maine) and Senator William D. Hathaway (D–Maine) introduced virtually identical bills that would have limited the tribal remedy to monetary damages.[219] The bills would not have eliminated the entire pending lawsuit or have foreclosed any possibility of a negotiated settlement. A statement by the Maine delegation said:

> [T]here are no guilty parties in Maine today. The Federal government bears a heavy responsibility for the present situation. . . .The equities demand that the land aspect of the Indian claims be extinguished. There is simply no equitable way of forcing a return of land which has been settled, developed and improved in good faith by Maine people for two centuries.[220]

Representative Cohen noted the Justice Department's decision to reduce the size of the claim, but indicated that it did not negate the necessity for the legislation, since vast acres of claimed land still hung

[214] Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 531-32 (N.D. N.Y. 1977) (citations omitted).
[215] S. 842 and H.R. 4169, 95th Cong., 1st sess. (Mar. 1, 1977).
[216] Representative William S. Cohen, press release, Mar. 1, 1977.
[217] *New York Times*, Sept. 30, 1976, p. 16.
[218] Ibid., Feb. 10, 1977, p. 18.
[219] S. 842 and H.R. 4169, 95th Cong., 1st sess. (Mar. 1, 1977).
[220] Maine Congressional Delegation, statement, "Delegation to Introduce Bills on Indian Claims," Feb. 28, 1977.

in the balance and only by act of Congress could the cloud on title be effectively removed.[221] He also mentioned the intent of the Maine delegation to introduce further legislation authorizing the Federal Government to guarantee all State and local bonds and land transactions, although he acknowledged the difficulty of such a measure.[222] No such bill was ever introduced.

Senator Hathaway also indicated that the impetus behind the bill was to remove the cloud on titles while allowing the case to proceed:

> It is not intended to be a judgment on the legal merits one way or another; it is, however, a recognition that there are other considerations which demand to be taken into account. The most significant of these is the potential economic disruption and confusion in the State of Maine which might result from the mere pendency of the litigation, regardless of the merits of the claim.[223]

Subsequent to that time, Senator Hathaway took the lead in negotiations that would not severely encroach upon the Indians' right to sue and at the same time would protect the non-Indian landowners by affording them just compensation. After that time, the Maine delegation never again took so unified a position, with all members in accord with the State position.

The Passamaquoddy and Penobscot Tribes were quick to respond. On March 8 the tribes issued a statement that recounted 200 years of their history and the facts of their case. Sharply critical of the legislation, the statement concluded:

> The State of Maine, which has steadfastly refused our offer to negotiate, responded to these developments. . .by having the Maine Congressional delegation submit identical bills in the House and Senate providing for the total elimination of our claims by retroactively ratifying these illegal transactions. While the members of the delegation tried to tell us that these bills would preserve our rights to sue for money (as though that should be enough), anyone who reads the legislation can see that it leaves no claim at all.[224]

The Maine extinguishment bills, however, failed to make any progress, in large part because of the staunch opposition of the relevant committee chairmen. In a terse and unequivocal statement released March 12, 1977, Representative Morris Udall (D–Ariz.), Chairman of the House Committee on Interior and Insular Affairs, and Representative Teno Roncalio (D–Wyo.), Chairman of the Subcommittee on Indian Affairs and Public Lands, declared that it was "inappropriate for the Congress to involve itself in the dispute. Under existing circumstances," the chairmen said, "the House Committee will initiate no legislative or oversight activity on the matter in order to facilitate the possibility of a negotiated settlement."[225] Negotiation, coupled with a Federal mediator, was urged as the best approach, with Congress cooperating with the endeavors. The chairmen's statement declared that "the Committee will take a dim view" of failure by any affected party to negotiate.[226]

Senator James Abourezk (D–S. Dak.), then Chairman of the Senate Select Committee on Indian Affairs, echoed these sentiments. "The Maine bill would be an interference on one side," he said. "If there were going to be such an interference, I would rather do it on the other side."[227] He also maintained that it was an inappropriate time for any legislative effort. Without the support of the Committee chairmen and with the stern opposition from the Indian tribes, the bills were destined to go nowhere. Although the Senate Select Committee on Indian Affairs changed chairmen after the 1978 election, the mood was such as to settle the claim once and for all through a negotiated settlement.

The opposition did not discourage election year bills, however. Governor James B. Longley and Attorney General Joseph E. Brennan again requested their congressional delegation to introduce their draft legislation, which would have done three things—transferred the claim to the U.S. Court of Claims, provided a mechanism to determine the amount of compensation, and converted the claim to an action for money damages only.[228] The bills were

[221] 123 *Cong. Rec.* H1533 (daily ed. Mar. 1, 1977) (remarks of Rep. Cohen).
[222] Ibid.
[223] 123 *Cong. Rec.* S3206 (daily ed. Mar. 1, 1977) (remarks of Sen. Hathaway).
[224] Passamaquoddy Tribe and Penobscot Nation, statement, Mar. 8, 1977, reprinted in *NARF Announcements*, pp. 9–10.
[225] Representatives Morris K. Udall and Teno Roncalio, "Statement Regarding Indian Claims Case," Mar. 12, 1977.
[226] Ibid.
[227] Lyle Denniston, "A Serious Dispute Over Indian Land Claims in Northeast," *Washington Star*, Mar. 20, 1977, p. A-1; see also *NARF Announcements*, p. 11.
[228] S. 3130 and H.R. 12834, 95th Cong. 2nd sess. (May 23, 1978); see also Attorney General Joseph E. Brennan, letter to Senator Edmund S. Muskie, May 19, 1978, reprinted in 124 *Cong. Rec.* S8113 (daily ed. May 23, 1978).

introduced although both Maine Senators acknowledged that doing so was "an exercise in futility."[229]

Legislation and the Mashpee Claim

Representative Gerry Studds (D–Mass.), in whose district Mashpee was located, met with the non-Indian citizens of the town in late 1976. Many of these property owners were looking for Federal legislation to solve the economic problems—both the anticipated and the real—which the town experienced as a result of the suit.[230] The cost of indemnification of title in Mashpee would total $300 million. Moreover, any attempt at such legislation would be subject to amendments seeking similar guarantees for other areas affected by Indian land claims.[231] Congress, he said, would not likely agree to such an expense. Two additional conditions had to be met before any legislation had a chance of passing in Congress, he explained. First, it must not be subject to a constitutional challenge. Second, it must be accepted by all parties in the suit.[232] This view ran counter to the sentiment of many of Representative Studds' constituents and was also at odds with the town's attorneys, who had drafted indemnity legislation.[233]

In 1977 legislation was again requested to guarantee title in Mashpee. This time Representative Studds did comply with the request for legislation, along with Senators Kennedy (D–Mass.) and Brooke (R–Mass.). Identical resolutions were submitted[234] in both the House and Senate. The legislation would have extinguished title and made the U.S. Government liable for compensation if the Indians won on the question of recognized title. The legislation noted that the tribe had already amended its suit to exclude homeowner plots of 1 acre or less. That modification, however, was not enough to clear title to land. Only Congress has the power to clear title of Indian lands.

The House Subcommittee on Indian Affairs and Public Lands held hearings on the resolution in October 1977.[235] Representatives from both the tribe and the New Seabury Corporation indicated support for the measure, but the administration, through Eliot Cutler of the Office of Management and Budget, strongly opposed the resolution.[236] His position, in short, was that it was not good policy to so expose the United States to potential liability for a fifth amendment taking. Just compensation, equal to the fair market value plus interest, could climb considerably above the current value of $150 to $200 million. That would set a dangerous precedent for other Indian claims, Mr. Cutler said.[237]

Faced with such strong objections—congressional enactment was highly doubtful and even if enacted probably faced a veto—the House subcommittee refused to report the bill to full committee.[238] In the meantime, other possible legislative options were discussed. Senator Kennedy and Senator Brooke also prepared the draft of a new resolution that overcame some of the objections encountered in the earlier attempt. During the Senate's hearing on Mashpee, Senator Kennedy outlined three options:

1. S.J. Res. 86, which would extinguish title and make the U.S. Government liable if the tribe won its current suit;
2. Establish a fund, managed by the Secretary of the Interior, to be awarded to the tribe, upon a favorable judicial ruling; and
3. Recommend an immediate out-of-court settlement for homeowner lots of 1 acre or less agreed to by all parties.[239]

OMB objected to the third alternative which was the heart of the new Kennedy-Brooke draft. The administration believed such an approach would encourage frivolous actions because it would provide remedies without proof of liability.[240] Alternatively, the administration proposed the creation of a $4 million fund that would be turned over to the tribe, should it prevail. This compensation would be in lieu of receiving property (up to and including 1 acre per property owner of developed land) and any other recovery from the United States or any other sovereign.[241]

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[229] *Maine Times*, June 2, 1978, p. 6; 124 *Cong. Rec.* S8112 (daily ed. May 23, 1978) (remarks by Sen. Muskie).
[230] Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978), was filed in August 1976.
[231] Samuel Allis, "Mashpee Residents, Studds Lock Horns," *Boston Globe*, Dec. 12, 1976, p. 33.
[232] Ibid.
[233] Ibid.
[234] S.J. Res. 86 and H.J. Res. 612, 95th Cong., 1st sess. (Oct. 4, 1977).
[235] U.S., Congress, House of Representatives, Subcommittee on Indian Lands, *Mashpee Lands: Hearing on H.J. Res. 612*, 95th Cong., 1st sess., Oct. 13, 1977 (unpublished).
[236] U.S., Congress, Senate, Select Committee on Indian Affairs, *Mashpee Lands: Hearings on S.J. Res. 8[illegible]*5th Cong., 1st sess., Oct. 21, 1977, p. 1 (hereafter cited as *Mashpee Lands—Senate*).
[237] Ibid., p. 42.
[238] Ibid., p. 17 (remarks of Sen. Kennedy).
[239] Ibid., pp. 17–18, 21–22.
[240] Ibid., p. 45 (remarks of Mr. Cutler).
[241] Ibid., p. 43.

An attorney for the Indians testified against the OMB proposal and in favor of the original Senate resolution.[243] The OMB solution, he argued, would put a cap on the potential recovery and still subject the tribe to the risk of litigation. Such a solution, unlike the joint resolution, would not preserve the status quo.[243] Representatives for both the tribe and the town agreed to meet to discuss amendments to Senate Joint Resolution 86 which, upon their agreement, could be submitted to the committee. Chairman Abourezk supported this approach, despite the administration's opposition.[244]

Meanwhile, the Mashpee trial concluded and the Indians were defeated before any congressional action could be taken.[245]

New York Legislative Efforts to Curtail Claims

Several attempts were made to enact legislation that would block the Indians' action to recover land in New York, as well. Although they were not successful, one attempt has been revived in successive Congresses.

The first effort by New York Members of Congress was an amendment offered on the floor of the House by Representative William Walsh (R–N.Y.) to the appropriations bill for the Department of Justice, which read:

> None of the funds appropriated by this title may be used to represent the Cayuga Indians in any action at law or suit in equity to recover any damages or real property from the State of New York or any owner or prior owner of any real property located in the State of New York.[246]

This amendment was a novel attempt to circumvent the Interior and Insular Affairs Chairmen who had declared their opposition to extinguishment legislation in Maine several months previously. Representative Walsh, in remarks during the House debate, expressed sympathy for the non-Indian landowners of the properties in dispute:

> Two wrongs will not make a right. . . .Now because some pointy-headed bureaucrat with nothing better to do decides the Government should pursue the claim, these people may have to go to some tremendous legal expense to defend their lands.
>
> Frankly, I think it is time the decent, law abiding, hard-working, tax paying citizens of this Nation got a break. What an innovation it would be for Government to come to their assistance for a change.
>
> Well, here is our chance. Limit the funds of the Justice Department to the prosecution of criminals rather than the harassment of American citizens.[247]

The chairman of the relevant appropriations subcommittee opposed the amendment, stating:

> If the Indians in New York have a legitimate claim and the Department of Justice is authorized to represent them or authorized to be involved in some way in the matter, I think that the Department should be permitted to do so.[248]

The amendment was rejected by a vote of 43 to 27.[249]

Representative Walsh then introduced an extinguishment bill that would have confined any claims brought by the Cayuga, Oneida, St. Regis Mohawk, Onondaga, or Seneca Tribes to a monetary remedy only.[250] Cited as the State of New York Aboriginal Claims Act of 1977, the bill failed to note that some of the titles at issue were based on recognized title and not aboriginal title, and nevertheless would be subject to full fifth amendment just compensation claims. Even assuming that the bill would have passed the committee, the prohibitive fair market value cost would have rendered passage unlikely. Neither Representative Walsh nor his successor, Representative Gary A. Lee (R–N.Y.), reintroduced the legislation.

Representative James Hanley (D–N.Y.) also considered introducing what he called "harsh legislation" to extinguish the Oneida claim to land.[251] However, after he was informed that such action would probably constitute a fifth amendment taking,

[243] Ibid., pp. 52–55 (remarks of Thomas N. Tureen).
[244] Ibid., pp. 68–69.
[245] Ibid., p. 72 (remarks of Sen. Abourezk).
[245] Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940 (D. Mass. 1978) (verdict announced on Jan. 6, 1978).
[246] 123 *Cong. Rec.* H5697 (daily ed. June 9, 1977).
[247] Ibid., p. H5727–5728.
[248] Ibid. (remarks of Rep. Slack).
[249] Ibid.
[250] H.R. 9906, 95th Cong., 1st sess. (Nov. 2, 1977).
[251] 123 *Cong. Rec.* H6826 (daily ed. July 12, 1977) (remarks of Rep. Hanley).

compensable at fair market value in excess of $1 billion,[252] he declined to introduce the measure in that session.

In 1979, however, local officials from Madison County asked Representative Hanley to introduce a bill that would ratify the treaties retroactively and, it was argued, thereby extinguish the Indian land claims.[253] The 1977 Oneida test case did not involve the full claim but was limited to Madison and Oneida Counties and only settled the issue of liability, not the issue of damages.[254]

The Search for a Negotiated Settlement in Maine

The chain of events that led to a number of resolutions to the Passamaquoddy and Penobscot Indian land claims is a fascinating study. The Maine claims have been the largest and most publicized and the most aggressively opposed, and attempts at negotiation, mediation, or conciliation have proceeded for the greatest length of time. A whole array of solutions have been proposed: Judge Gunter's recommendation, the White House joint memorandum, the Hathaway memorandum, and a later modified version or versions of a settlement. A congressionally enacted settlement agreement was finally achieved in September 1980.

The Gunter Appointment and Preceding Events

Following the *Passamaquoddy* case in 1975,[255] the Department of Justice decided not to appeal its obligation to represent the tribe to the U.S. Supreme Court, but rather began the laborious job of researching the massive claims. The court case had simply reaffirmed the Federal trust responsibility as it related to the duty of the Federal Government to represent the tribes, but it did not spell out the precise form that the responsibility should take or provide a legal strategy for the Justice Department.

In January 1977 the district court judge granted an adjournment of the case to allow further time for research and also to allow the incoming Carter administration a chance to pursue alternatives.[256] In the interim, the Department of Justice had received a litigation report prepared by the Department of the Interior recommending that the Federal Government seek 8 to 10.5 million acres plus $300 million in rent and damages for the Indians.[257] In its motion for the delay, Justice stated that it needed more time to study the Interior Department recommendations. In addition, the Department of Justice recommended that congressional involvement, which would be required in any event before the case could be completely settled, should begin before the conclusion of litigation.[258]

Several requests for a mediator, negotiator, or Presidential representative followed. The Maine congressional delegation called on President Carter to "recognize a moral and legal obligation" to take the lead in developing policies geared towards a settlement and also to name an independent observer to assess the situation.[259] Congressional representatives for Mashpee also called for a Presidential representative for the land claims, favoring an independent mediator over a factfinder.[260] The tribes, too, supported the idea of a Presidential representative, since they had favored an out-of-court settlement all along. Only the Maine State officials continued to press for litigation. Maine's Attorney General Joseph Brennan said, "The case will ultimately be successfully defended in the courts."[261]

President Carter, after taking office on January 20, quickly responded to the pleas. A Department of Justice memorandum, filed with the district court in Maine on February 28, announced President Car-

[252] *NARF Announcements*, p. 8.

[253] Doug Carroll, "Tribal Lands: In New York, Six Million Acres Hang in the Balance," *Washington Post*, Sept. 24, 1979, p. A-2.

[254] Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527 (N.D. N.Y. 1977).

[255] Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (N.D. Me. 1975), *aff'd*. 528 F.2d 370 (1st Cir. 1975).

[256] United States v. Maine, Civil Nos. 1966 and 1969 (N.D. Me., Jan. 17, 1977) (order granting extension of time for hearing); see also, *New York Times*, Jan. 18, 1977, p. 62.

[257] U.S., Department of the Interior, *Final Drafts of Litigation Reports in the Cases of United States v. Maine, Civil No. 1966 N.D., and United States v. Maine, Civil No. 1969 N.D.*, submitted to the Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, Jan. 11, 1977. In explaining the broad sweep, the report noted that once the Federal Government had been ordered to acknowledge the trust relationship, it was "in no position to view our responsibilities in a niggardly fashion." Further, if the Government sued for less than the tribes could demonstrate as a legitimate claim, such action might have the practical effect of extinguishing title—a task only Congress was empowered to do. Alternatively, land in the claim area not brought into a Justice Department suit might still be brought by the tribes, thus leaving a portion "in a legal limbo long after resolution of the suit." *Final Draft*, Civil No. 1966 N.D., pp. 12–13; see also, "Why Interior Department Attorneys Took a Hard Line," *Maine Times*, Feb. 9, 1977.

[258] U.S., Department of Justice, *Memorandum to the U.S. District Court, Northern District of Maine*, Jan. 14, 1977, reprinted in 123 *Cong. Rec.*, S3205 (daily ed. Mar. 1, 1977).

[259] *New York Times*, Feb. 10, 1977, p. 18.

[260] *Mashpee Lands–Senate*, p. 24. Members of the Maine delegation refused to join in signing a letter asking for a "mediator."

[261] John Kifner, "Justice Staff Asks Congress to Settle Maine Indian Suit," *New York Times*, Jan. 20, 1977, p. 19.

ter's upcoming appointment of a special representative in the case.[263] With that announcement and a plea for congressional action, the Justice Department put off filing any suit until June 1, to allow Congress and the special representative a chance to work somthing out.

President Carter asked retiring Georgia Supreme Court Justice William B. Gunter to be his special representative in the case. The role chosen for Judge Gunter was the one recommended by the Maine delegation—an independent evaluator,[263] not an arbitrator or mediator as was recommended by the Massachusetts delegation and the House Interior Committee.[264]

Then Senator Edmund Muskie called the choice "excellent," noting that Judge Gunter had the confidence of key figures in the land claim discussions, including Attorney General Griffin Bell and White House Counsel Robert Lipshutz, and he came to the case with "no obvious Maine connection or slant in any direction."[265] The Native American Rights Fund, however, was hestitant, noting that Judge Gunter was unknown to the Indians prior to the announcement.[266]

Judge Gunter's Attempt

On March 20, 1977, Judge Gunter held a "get-acquainted meeting" with tribal governors, the Maine Governor, attorneys on both sides, Interior and Justice officials, and members of the White House staff. Several participants described the session as "letting off steam."[267] White House Counsel Robert Lipshutz called it "an excellent start."[268] From that time on, Judge Gunter did not hold sessions with all the parties, but met separately with each group, requesting briefings on the legal issues and the concerns of various parties.

Before the Gunter recommendation was issued, there were many who considered this approach inadequate. Representative Udall and Senator Abourezk, after meeting with the judge, called for a congressional-administration effort to establish neutral third-party mediators for any claim that needed one.[269]

Judge Gunter's recommendation, issued on July 15, 1977, set the record straight on the description of his role. "I have not acted as a mediator in this matter; my role has been more that of a judge."[270] In his report, Judge Gunter concluded that although the States of Maine and Massachusetts (out of which Maine was created in 1820) bore some responsibility for the problem, the Federal Government was primarily responsible. The tribes and property owners within the claims areas were totally absolved of any blame. The primary harm of the cases was seen as an adverse economic result in these States. Absent such impact, Judge Gunter could see no necessity for Presidential action.

His specific proposals for recommendations to Congress included: $25 million appropriations for the tribes to be administered by Interior; 100,000 acres of State-held lands to be conveyed to the United States as trustee for the tribes; and long-term options to be acquired on an additional 400,000 acres of land in the claims area and exercised at the election of the tribes. Other proposals involved maintaining BIA benefits and State benefits.[271] After receiving the consent of the State of Maine to give up 100,000 acres and maintain normal benefits, tribal consent should be sought to accept the benefits as the sole remedy. If consent were given, all claims of the two tribes should be extinguished, but if consent were withheld, all claims should be extinguished anyhow, except for the State-owned land. The tribes would then be allowed to proceed through the courts, while the adverse economic consequences would be eliminated. Finally, if the State of Maine would not consent, the tribes should be given $25 million for their consent to relieve economic stagnation and to narrow the claims.[272] Judge Gunter expressed hope that all parties would agree, but the recommendations included coercive steps to be taken if unanimity could not be reached.

[263] John Kifner, "U.S. May Sue Maine in Indian Land Case: It Gives State Until June 1 to Reach a Settlement Out of Court," *New York Times*, Mar. 1, 1977, p. 1.
[263] Office of the White House Press Secretary, press release, Mar. 11, 1977.
[264] In particular, Chairman Morris K. Udall of the House Interior Committee and Chairman Teno Roncalio of the Indian Affairs Subcommittee.
[265] A. Mark Woodward and Donald Larrabee, "Land-case Bills Shelved, Coordinator Chosen," *Bangor Daily News*, Mar. 12–13, 1977, p. 1.
[266] *NARF Announcements*, p. 11.
[267] John Kifner, "Sides in Maine Suit Meet in White House," *New York Times*, Mar. 30, 1977, p. A–10.
[268] Ibid.
[269] *NARF Announcements*, p. 12.
[270] William B. Gunter, "Recommendation to President Carter re Passamaquoddy and Penobscot Tribal Claims—Maine," July 15, 1977, reprinted in *NARF Announcements*, p. 12.
[271] Ibid.
[272] Ibid.

President Carter's immediate pronouncement was that the judge's report was "fair, judicious and wise."[273] He also told Judge Gunter that the Indian issue in Maine was "one of the most difficult and controversial" decisions since he assumed office in January.[274] Few such comments came from any other sources. Senator Abourezk sharply criticized the report, accusing Judge Gunter of acting "as though he were conducting a trial without benefit of the rules of evidence and other aspects of due process. His recommendation is devoid of fairness and understanding of the historical nature of the land claim."[275]

Maine officials were relieved that no recommendation was made to take private lands, but they were dissatisfied with the grant of State lands. Attorney General Brennan reacted favorably to what he called the "99.9 percent" reduction in the scope of the claim, but was still distressed at the idea of "requiring the State of Maine to contribute land."[276] Maine's commissioner of conservation also expressed his views:

> If the Federal Government wants to give away land in Maine, they've got their own land. . . .I don't think Judge Gunter realizes how little public land there is in this state.[277]

The Indians waited over a week before responding, and in the interim, Judge Gunter added a new proposal in a television interview, which was not part of the official report. He suggested that large property owners might help resolve the dispute by giving "10,000 or 5,000 acres apiece to the Indians."[278] Much of the land in the claims area was "owned" by large corporate timbering interests. Finally, the Indian leaders expressed their shock at the recommendation that Congress eliminate their claims to private lands in Maine. They issued a statement which noted that Judge Gunter's recommendation "would wipe out 90 percent of Indian claims to land in Maine whether or not the state tribes agreed to the other terms."[279] One tribal leader added:

> We spent five years getting the courts to force the Federal Government to act as our trustee. Now this man says that if we don't accept his terms, the President should protect the big timber companies by taking away our claim. I just don't understand it.[280]

The tribal statement did, however, contain one positive remark concerning Judge Gunter's plan. Noting that he recognized the claims to be valid, the tribes stated that they would consider his proposal to be "a point of departure."[281]

On the same day the tribal statement was issued, national Indian spokespersons, activists, and political leaders urged President Carter to reject Judge Gunter's recommendation that Maine Indian claims to private lands be extinguished without compensation. An excerpt from the three-page telegram with an 11-page listing of signatories declared:

> We deplore [Gunter's] failure to consider the rights of the Indians and particularly his suggestion that the United States wipe out 90 percent of their claims to land without any compensation if they do not accept his offer.
>
> [O]ne whose primary responsibility is to guard the treasury cannot hope to fulfill the function of an independent judiciary. It is unfortunate enough that Judge Gunter did not serve as mediator. But to say that the Indians must accept his proposal or face extinguishment of their claims by the political branches is to make a mockery of this nation's legal and moral trust obligations to Indians and to tell the world that the United States is unwilling to abide by the dictates of its own legally constituted courts.[282]

Followup talks were conducted by Judge Gunter and White House Counsel Lipshutz with tribal leaders and State officials. Maine Attorney General Brennan and Governor Longley reaffirmed the State's position that the Indians file suit for only an estimated 350,000 acres of public land in the State.[283] In a separate session, Indian leaders asked for a mediator to negotiate a settlement. Judge Gunter said he would assume a mediator role if the Presi-

[273] Donald Larrabee, "$25 Million, 100,000 Acres Proposed," *Bangor Daily News*, July 16–17, 1977, p. 1.
[274] Ibid.
[275] *Bangor Daily News*, July 16–17, 1977, p. 5.
[276] John Kifner, "Two Maine Tribes Would Get $25 Million and 100,000 Acres in Proposal," *New York Times*, July 16, 1977, p. 46.
[277] David Bright, "State Land Official Upset, Indians Mum," *Bangor Daily News*, July 16–17, 1977, p. 1.
[278] *New York Times*, July 18, 1977, p. 30.
[279] Ibid., July 27, 1977, p. A–10.
[280] Ibid. (comments by Francis Nicholas).
[281] *Bangor Daily News*, July 27, 1977, p. 1.
[282] Telegram to President Carter, July 26, 1977, reprinted in *NARF Announcements*, p. 15.
[283] Donald Larrabee, "Tribes Ask White House Mediator," *Bangor Daily News*, July 29, 1977, p. 1.

dent desired, but indications were that another person would be chosen.[284]

The White House Task Force

Although the Gunter report was rejected by both the tribes and the State, it became a basis for future negotiations. To resolve the impasse, President Carter appointed a three-member team, known as the White House task force. The group consisted of Eliot Cutler, Associate Director of OMB; Leo Krulitz, Solicitor of the Department of the Interior; and A. Stephens Clay, a partner of Judge Gunter in private practice.

The task force was given the mandate to work out an agreement "in keeping with the spirit" of Gunter's proposal.[285] Among the constraints placed on the group were a $30 million limit on Federal funds to settle the claims (imposed by the White House) and protection for the small landowners from losing their homes (in order for Congress to approve). As Mr. Cutler later stated, "We were unashamedly budget-conscious, and we had to protect those who are in no position to protect themselves."[286] For several months the White House group negotiated with the tribes. Noticeably absent from these sessions were State officials and representatives for landowners.

On February 10, 1978, the White House work group and representatives of the Passamaquoddy and Penobscot tribes issued a joint memorandum of understanding outlining a partial settlement of Indian claims. The basic agreement reached by the tribes and the White House included the submission of legislation in Congress that would pay the tribes $25 million in exchange for (1) extinguishment of the tribes' claims to 50,000 acres per title holder of land within the 5 million-acre revised claims area and (2) extinguishment of all their claims in the 7.5 million additional acres that were originally claimed.[287] The memorandum concluded that approximately 9.2 million acres would experience clear title, and an estimated 3.3 million acres would remain in dispute.[288] About 350,000 acres of this land are held by the State; the remaining 3.0 million acres are held by about 14 large landholders.[289]

The memorandum acknowledged the desirability of a complete settlement, but due to the difficulties in obtaining one, it opted for publication of the terms and conditions upon which the tribes would consent to settle with the State of Maine and the large landowners. The White House work group carefully explained its role as "an intermediary with limited authority to settle the remaining claims on the terms set forth by the tribes."[290]

The tribes agreed to wipe out their claims against Maine in exchange for an assurance that Maine would continue annual Indian appropriations at the current level of $1.7 million for the next 15 years, payable to the Department of the Interior, as trustee.[291] The tribes agreed to wipe out their claims against the large private landholders in exchange for 300,000 acres of average quality timberland plus long term options to purchase additional land totaling 200,000 acres at fair market value.[292] The tribes also asked for $3.5 million to help finance their exercise of these options.[293] Finally, the work group recommended the payment of $1.5 million directly to the landholders who contributed acreage and options in the package, divided in proportion to the contribution made.[294] This part of the offer was not endorsed by the White House, but was set out as a starting point for further negotiations.[295]

Thus, the Federal Government would pay $25 million to achieve the basic agreement and an additional $5 million to facilitate a settlement of claims against private landholders. The $30 million total amounted to the maximum that the work group was authorized to offer. Additional provisions in the memorandum included an explanation that all cash funds be given in trust for the benefit of the tribes and divided equally between the two of them. The work group also agreed to use its best efforts to assure access to a place in Baxter State Park for religious ceremonial purposes. The location of the 300,000 acres had to be satisfactory to the tribes, though not necessarily in one piece. All lands acquired by the tribes and land currently held by the tribes would be covered by Federal jurisdiction.[296]

The agreement was first presented to Maine's Governor Longley and Attorney General Brennan

[284] Ibid.
[285] Aimee L. Morner, "How the Indians Frightened Great Northern Nekoosa," *Fortune*, July 31, 1978, p. 99.
[286] Ibid.
[287] Office of the White House Press Secretary, *Joint Memorandum of Understanding*, Feb. 10, 1978, pp. 1-2.
[288] Ibid., p. 2.
[289] Ibid.
[290] Ibid., p. 3.
[291] Ibid., pp. 3-4.
[292] Ibid., p. 4.
[293] Ibid.
[294] Ibid., pp. 4-5.
[295] Morner, "How the Indians," p. 99.
[296] Ibid., pp. 6-8.

on February 8 and to the Maine congressional delegation on the next day.[297] The State officials expressed their views immediately, while the congressional delegation adopted a "wait and see" approach. Governor Longley said he thought the White House had treated the attorney general of Maine and the Maine congressional delegation "very shabbily in disregarding and circumventing their important position on behalf of the people of Maine."[298] In the same tone, State Attorney General Brennan called the memorandum "really outrageous." He said it was "appalling that the task force members did not consult us and ask for any participation."[299] These remarks came despite the attorney general's earlier refusal to participate in any negotiations.[300]

The paper companies, which hold many of the large tracts of Maine land, also expressed indignation. The previous Gunter solution had removed their lands from the controversy while the State shouldered the major responsibility. One paper company president described the offer as "a cynical attempt to isolate a group of large landowners from everyone else" and as "a stacked deck, a raw deal."[301] Another called the offer "a de facto form of confiscation, and certainly not due compensation."[302]

Task force member Cutler defended the cutoff at 50,000 acres as inherently fair, since every landowner was subject to the same cutoff. However, he acknowledged that the large landowners were "singled out."[303] Another member, A. Stephens Clay, explained that the payment to landowners should not be considered payment for land but only payment to cover administrative costs. The companies still had the option to litigate; thus, it was not "tantamount to confiscation."[304]

President Carter, in an attempt to clear the way to settlement, explained at a New England press conference that "there is no constraint on the large landowner nor the state to accept the settlement."[305] They could choose among three options, President Carter explained, "accept the settlement, begin negotiations with the tribes, or fight the Indian claims in court."[306]

Behind the scenes two efforts continued concurrently. The Department of Justice began drafting legislation to implement the agreement relating to the small landowners. In addition, Presidential Counsel Lipshutz began a series of meetings to win over Maine to the work group proposal. These and other talks aimed at winning support for the White House work group's memorandum continued for several months after its issuance. Although only congressional support was needed for a partial settlement to take effect, the Carter administration consistently attempted to find a solution acceptable to all concerned.

A change in the State officials' position seemed to come about in one meeting with the tribes' attorney. Maine's Attorney General Brennan agreed to seek an out-of-court settlement of the Indian claim, provided that the Federal Government would assume the costs.[307] At the same time, the large landowners displayed a reluctance to engage in talks, preferring to let the State officials do the talking for them.[308]

Two major obstacles arose in negotiations between the tribes and the State officials. Both the Governor and the attorney general sought to have any land in question remain under State jurisdiction. The State officials also preferred a court of claims resolution of the claims, which would thus limit relief solely to a monetary settlement. When the tribes did not show signs of warming to their proposals, Governor Longley dropped out of the negotiations and left them to the attorney general until, as he expressed it, his "nation within a nation" concerns were answered.[309]

The tribes interpreted this development as a break in the talks. Criticism and accusations abounded on all sides. The upshot of the deteriorating tribal-State relationship was that the tribes urged the Federal Government to sue the State for $300 million and 350,000 acres but to hold off suing the large private landowners.[310] Relations between the tribes and the paper companies at the same time improved. The

[297] Stephen Wermiel, "White House to Ask $25m for Maine Indians," *Boston Globe*, Feb. 10, 1978, p. 16.
[298] *New York Times*, Feb. 12, 1978, p. 20.
[299] Ibid.
[300] Wermiel, "White House to Ask."
[301] Morner, "How the Indians," pp. 98, 100.
[302] Ibid., pp. 99–100.
[303] Ibid., p. 100.
[304] Ibid.
[305] Jonathan Harsch, "White House Prods Maine Indian Accord: Carter Formulates Trust, Donor Policy," *Christian Science Monitor*, Mar. 1, 1978.
[306] Ibid.
[307] *New York Times*, Apr. 27, 1978, p. A–21.
[308] Morner, "How the Indians," p. 190.
[309] Daniel Beegan, "Governor Quits Indian Land Negotiations," *Portland Press Herald*, May 19, 1978.
[310] *New York Times*, June 7, 1978, p. A–16.

process of locating timberland that the owners might consent to sell to the tribes at fair market value met with a modicum of success. Although insufficient land was offered, both the landowners and the Indians remained willing to talk. When the request for action against the State was made, attorneys for the tribes indicated that suing the landowners "might not be necessary if current discussions with those landowners lead to a satisfactory agreement.[311]

The task of writing legislation to implement the first part of the joint memorandum issued by the White House work group and the tribes was given to the Department of Justice. Legislation was designed to resolve the claims against small landowners. The legislation drafting effort eventually was dropped because Attorney General Bell refused to support any bill that would treat landowners differently because of the size of their holdings.[312] His refusal frustrated the efforts of the White House group toward a negotiated settlement.[313] The team thus had to reconsider a solution for all landowners in the State.

Prospects of Maine agreeing to a settlement looked grim over the summer of 1978. The Department of Justice was scheduled to bring suit against Maine for $300 million and 350,000 acres. In September, however, U.S. Attorney General Bell refused to press the suit and requested a 6-month delay in the litigation.[314]

Behind the scenes negotiations continued, culminating in an October settlement announced by Senator Hathaway, who had become personally involved in negotiating the settlement earlier in the fall. The plan was approved by President Carter, tribal leaders, and private landowners, but awaited formal State approval and a tribal vote. Although the agreement lacked State approval, it contained the two conditions that State officials had pressed for in any settlement—a total Federal solution and a provision establishing State jurisdiction over Indian lands. Specifics of the settlement included a $27 million Federal grant to the tribes and a $10 million State and Federal grant for purchase of 100,000 acres at fair market value from Maine's largest landowners.

Previously the Federal Government had favored a State contribution and Maine had fought for a total Federal payment. The two sides were brought together through the provisions that credited Maine with $5 million for its previous contributions to the tribes, which totaled $13 million. An additional concession to the State provided that all land sold to the Indians would be subject to Maine civil and criminal laws. Finally, the State would not be required to pay any more money to the tribes in the future,[315] unlike the earlier White House proposal that would have required the State to maintain its annual $1.7 million in tribal benefits for 15 years in order for the claims to be dropped.[316]

In discussing the negotiations Senator Hathaway remarked, "The main problem was getting them [the tribes] down and the White House up."[317] The new plan provided for 100,000 acres—a 200,000 drop from the previous offer by the Indians. It also raised by $7 million the previously announced ceiling on Federal funds, $5 million of which was credited as the State contribution.

Five days after the announcement, Maine's top non-Indian leaders agreed to accept the plan, agreeing to it largely because the settlement placed full responsibility for the land claims on the Federal Government.[318] Although many Maine residents assumed that a final settlement had been reached, many details were still unresolved. Although the paper companies had tentatively agreed to a sale of 100,000 acres, the parcels and prices had not been agreed upon. More important, the tribal approval did not automatically come as some had expected.

The tribes, realizing that the Hathaway memo would give them far less than what they previously said was their bottom limit, needed to estimate how close the current cash offer would put them toward

[311] Ibid.

[312] Katheryn Oberly, attorney, Department of Justice, interview in Washington, D.C., Nov. 30, 1978.

[313] Additionally, due to the negotiations in Maine, Attorney General Bell changed his litigation strategy in three other States: New York, South Carolina, and Louisiana. In a letter to Secretary Andrus, Attorney General Bell stated that the Justice Department would not sue landowners in those three States because of the administration's policy decision to relieve small landowners in Maine and because of the Attorney General's position that he would not support a settlement bill which forced anyone (other than a State) to give up land. Attorney General Griffin Bell to Secretary Cecil D. Andrus, June 30, 1978, reprinted in U.S., Congress, Senate, Select Committee on Indian Affairs, *Statute of Limitations Extensions*, 96th Cong., 1st sess., 1979, pp. 34–36.

[314] John S. Day, "U.S. Offers to Pay Indian Claims: Maine Would Bear No Cost Under Proposal," *Bangor Daily News*, Oct. 18, 1978, p. 1.

[315] There was no formal written document for the settlement. See generally, John S. Day, "U.S. Offers to Pay Indian Claims," *Bangor Daily News*, Oct. 18, 1978, p. 1; Arthur P. Bushnell, "Proposal May End Indian Case," *Portland Press Herald*, Oct. 18, 1978, p. 1; John Lovell, "Proposal Surprises Longley," *Portland Evening Express*, Oct. 18, 1978, p. 1; *Boston Evening Globe*, Oct. 18, 1978, p. 1.

[316] Office of the White House Press Secretary, *Joint Memorandum of Understanding*, Feb. 10, 1978.

[317] *Portsmouth Herald* (N.H.), Oct. 19, 1978, p. 2.

[318] Susan Pstlewaite, supplemental material, *New York Times*, Oct. 24, 1978, p. 36 (on microfilm and microfiche only).

obtaining their desired land base. A tribal referendum in March 1979 resulted in acceptance of a proposed modified version of the proposal; the money requested was reduced by $10 million while the acreage was increased to 300,000.[319] The Carter administration did not support the request for more land if it meant new monies. Only if the funds toward settlement could be garnered from existing programs would the White House approve.

In the interim, cases in several areas superficially related to the land claims enhanced the tribes' bargaining position. The first, *Bottomly v. Passamaquoddy,* involved a suit against the tribe for services.[320] In a brief filed in the case by Maine's deputy attorney general, a number of arguments were presented to show that *Passamaquoddy v. Morton* was in error.[321] This analysis apparently was intended to be used by the State if the litigation brought by the United States in its trust capacity against Maine came to court. In the *Bottomly* case, the State's arguments were clearly rejected, thus weakening the State's position in the case and the ongoing negotiations.

The other cases decided in July 1979 by the Maine Supreme Judicial Court concerned the arson convictions of two Indian men [322] and the case of a man accused of starting a ceremonial campfire without a permit.[323] In the arson case, the court disagreed with the State's definitions of "Indian country" and "dependent Indian communities."[324] Further, it disagreed with Maine's contention that *Passamaquoddy v. Morton* was wrongly decided.[325] In the ceremonial fire case, the judge ruled that the State did not prove beyond a reasonable doubt that a paper company had better title to the property in queston than the Penobscot Indians.[326] If the Penobscots held the land, the Indians would not have needed a permit to light a fire.[327]

These cases taken together raised doubts about Maine's ability to prevail in the claims litigation.[328] Thus, one of the major concessions to the State of Maine had been thrown in jeopardy—granting Maine jurisdiction over the acquired lands.

Negotiations, however, continued and a complex jurisdictional arrangement was finally agreed upon. The tribes are accorded the status of State municipalities with exclusive jurisdiction over internal tribal matters, minor criminal offenses involving Indians, small claims, civil matters, and issues of domestic relations. Maine, otherwise, has extensive jurisdiction over Indian lands. The settlement also provides for the acquisition of 300,000 acres of land for the tribes to be held in trust by the Federal Government and the establishment of a trust fund of $27 million to be administered for the benefit of the tribes. The settlement was signed into law by President Carter on October 11, 1980.

Other Claims Negotiations

Of all the Eastern Indian land claims, the Narragansett claim was the only one to reach a final settlement quickly. The original claim of 3,200 acres was reduced to a 1,800-acre settlement, complete with some of the key ingredients necessary for Federal approval. When the settlement was approved by Congress, there was much talk of using it as a model for other claims. At the same time, many critics of this suggestion pointed out the wide disparities between the Narragansett claim and the larger claims such as the Maine claims.

One remarkable contrast between Maine and Rhode Island has been the willingness of Rhode Island officials to negotiate. In hearings on the Rhode Island Indian Claims Settlement Act,[329] the special assistant State attorney general for Indian affairs testified that the key to success in the negotiations came from the "personal interest, direct involvement and crucial suggestions" of Rhode Island's Governor J. Joseph Garrahy.[330]

The Narragansett claim began in January 1975 when two lawsuits were filed against the State and private landowners for a total of 3,200 acres of land. The cases were consolidated and significant prelimi-

[319] *New York Times,* Apr. 22, 1979, p. 57.
[320] Bottomly v. Passamaquoddy Tribe, 599 F.2d 1061 (1st Cir. 1979).
[321] Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).
[322] Maine v. Dana, No. Was. 78-3 (Me. Sup. Ct.) (July 3, 1979)(6 I.L.R. G43 (1979).
[323] Maine v. Francis, (July 1979).
[324] Maine v. Dana, slip opinion at 8-9, 13-15.
[325] *Id.* at 22-23.
[326] Peter Slocum, "Indian Innocent in First 'Land' Case," *Portland Press Herald,* July 20, 1979.
[327] Ibid.
[328] See, e.g., *New York Times,* July 22, 1979, p. 22.
[329] 25 U.S.C. §1701 *et seq.* (1978).
[330] U.S., Congress, Joint Hearing Before the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs, Subcommittee on Indian Affairs and Public Lands, *Rhode Island Indian Claims Settlement Act,* 95th Cong., 2d sess., 1978, p. 62 (testimony of William Brody) (hereafter cited as Rhode Island Settlement—Joint Hearing).

nary motions were decided in the tribe's favor in 1976.[331] During the course of tribal preparations, attorneys for the tribe, the State, and private landowners began meeting to discuss the possibilities of settlement negotiations. Talks proceeded in a conciliatory spirit for over a year before agreement could be reached. Consultation with nonparties included State legislative officials, the Town Council of Charlestown (where the land in question was located), the Rhode Island congressional delegation, and the White House.

The negotiations culminated in a 19-point document signed by the attorneys for all parties as well as Governor Garrahy and the Town Council of Charlestown.[332] To become effective, the agreement required three additional steps: (1) a determination by the Department of the Interior that the Indians had a credible claim to the lands in question, (2) legislation by Congress to extinguish title to the rest of the claim and to appropriate funds necessary to the agreement, and (3) legislation by the State of Rhode Island to set up a State-chartered corporation for the purpose of acquiring, managing, and permanently holding the settlement lands.[333]

The three steps followed in uneventful succession. The Interior Department determined that the tribal claim was "credible," or one that was beyond a frivolous claim but something short of an absolutely certainty.[334] This credibility requirement was added to ensure that frivolous claims would not flood the courts and Congress. Further, it offered Congress reassurance that funds would not be sought before fully establishing the facts in the case.

The congressional legislation was drafted by the appropriate congressional committees, the Interior Department, and the White House. The chairmen of those committees in June 1978 held a joint hearing so that the matter could be expedited. The Senate approved the agreement on July 21 and the House followed on September 12, 1978, acting under a suspension of the rules to further speed up the process. Approval by the House came despite Representative Cohen's objections that such a precedent-setting measure should not be passed under the suspension procedure and also that all claims under the Nonintercourse Act should be considered on a comprehensive rather than a piecemeal basis.[335] President Carter signed the settlement into law on September 30, 1979, offering an encouraging word for what he called "just and amicable settlements of legitimate claims."[336]

The third step, State incorporation legislation, occurred early in the 1979 session. Fear that the bill might be held up to win concessions on other bills did not prove correct, as it passed both houses by unanimous vote.[337] Governor Garrahy signed the bill into law on May 11, 1979, amid the ceremonial smoking of the peace pipe.[338]

Findings

Land Claims

1. The failure of the Federal Government to implement effectively its statutory commitments to tribes resulted in the Indian land claims.

2. Both the United States and the individual States initially refused to take tribal claims seriously, thus missing opportunities for negotiations and ultimately escalating the conflicts.

3. The United States, after initial efforts that were unsure and unsuccessful, has adopted a case-by-case approach to negotiation as a means to solve land claims. Some of the principles established include the following:

- Good faith negotiations must have been attempted before a claim may be litigated.
- If necessary, the United States will litigate meritorious claims.
- Affected Federal agencies and the "injured" tribe determine what they will accept in lieu of court action using a task force approach.

4. Tensions arising from the land claims have exacerbated racial animosities in affected communities, especially where State and local officials have been unwilling either to take the claims seriously or to negotiate.

5. For the eastern tribes, land claims provide a potential for future economic and cultural survival.

[331] Narragansett Tribe of Indians v. S. R.I. Land Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976); Narragansett Tribe of Indians v. Murphy, 426 F. Supp. 132 (D.R.I. 1976).

[332] *Joint Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims*, Feb. 28, 1978, as reprinted in *Rhode Island Settlement—Joint Hearing*, p. 67.

[333] Ibid., pp. 67-70.

[334] *Rhode Island Settlement—Joint Hearing*, p. 113.

[335] 124 *Cong. Rec.*, H9484-9485 (daily ed. Sept. 12, 1978) (remarks of Rep. Cohen).

[336] *Weekly Compilation of Presidential Documents*, vol. 14, p. 1696 (Oct. 2, 1978).

[337] "Indian Land-Claim Act is Sent to Garrahy," *Providence Journal*, May 5, 1979.

[338] "A Historic Moment: Indian Land Claim Bill Signed," *Narragansett Times*, May 17, 1979.

Land Claims

1. The prelitigation task force approach, in which the United States and the tribes jointly determine an acceptable settlement prior to full litigation of the claim and before bringing Congress, the State, and local communities into the process, should be maintained for eastern land claims.

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Chapter 5

Law Enforcement

The scheme of legal jurisdiction in Indian country has been variously characterized as a patchwork, a labyrinth, and a maze. It is not a product of logic but has developed through layers of historical events and changes in the national philosophy toward Indian tribes.

The manner, quality, and frequency of criminal law enforcement on Indian reservations have been issues of great significance in Federal-Indian relations that have frequently transcended the substance of a particular issue. Politically, incidents on one reservation, or a few reservations, have affected policy and law on all reservations. For example, the manner in which the Sioux handled a murder of one of their members by another in the late 19th century was directly responsible for increasing the Federal presence on all reservations. Law enforcement problems in some areas in the 1950s led to a greatly increased State role on reservations in many areas, and the violence associated with the occupation of Wounded Knee in the 1970s helped fuel a nationwide "backlash" against Indians.

Criminal law is an area in which the Federal Government is a direct supplier of services. The tribe or State or both, depending upon which tribe and which State, can also be direct service providers. The ownership of the particular parcel of land or the race of the perpetrator or victim of the crime can also affect who has jurisdiction.

This chapter will trace some of the historical events and policy changes and focus on two areas in law enforcement where the Federal Government has had a major role—its direct statutory responsibilities under the Major Crimes Act and its undefined role in implementing the Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe.* [1]

Historical Perspective

Conflict over the power to control Indian land and resources has been a constant factor in the history of this country's relations with Indian tribes. Parties to those conflicts have been the tribes, the States in which Indian reservations are found, and non-Indians present or having property interests on or near reservations. The Federal Government's role has been one of vacillation between the protection of tribal autonomy and resources and the pursuit of a policy of assimilating Indians into the dominant society. Each swing in Federal policy has left a tangled legacy of land ownership and jurisdictional patterns, the effects of which have persisted after the Federal policy that established them has been repudiated.

Indian reservations, as noted previously, were established for the most part in the 19th century as an adjunct to Federal policy that encouraged white settlement and westward expansion of the new nation. To the extent that the presence of Indian tribes impeded that process, they were removed and restricted to reserved land. This was done through a series of treaties between various tribes and the Federal Government that guaranteed Federal protection for the tribes and their remaining assets. The nature of the Federal, State, and tribal relationship

[1] 435 U.S. 191 (1978).

was defined in this period by the U.S. Supreme Court in the seminal cases of *Cherokee Nation v. Georgia* [2] and *Worcester v. Georgia.* [3] These cases resulted from conflict over jurisdiction and economic resources of the same character that occurs today.

In a highly politicized setting, the Supreme Court of the United States, led by Chief Justice John Marshall, struck down an entire series of State statutes as violative of tribal-State and tribal-Federal relations. These cases established the principles that Indian tribes possessed sovereignty over their members and territory, subject to the legislative authority of the Federal Government; that States had no jurisdiction over Indian territory; and that the Federal Government protects tribal sovereignty, land, and resources from State governments and non-Indian interests.

Ultimately, political pressures deprived the Cherokees of the fruits of their legal victory, and they were removed to the western territories. Nonetheless, the legal principles enunciated by Chief Justice Marshall continued to serve as the theoretical model for tribal, State, and Federal relations with the Indian reservations created in the mid-19th century "to concentrate the various Indian nations away from the major paths of white westward movement."[4]

When initially established, Indian reservations were enclaves almost exclusively occupied by Indians. In the first treaties between the new government of the United States and the Indian tribes, from 1778 until approximately 1796, criminal jurisdiction over Indians and Indian territory was premised upon the assumption that Indian tribes possessed complete sovereign powers over their own members and over their own lands. Many of the early treaties recognized tribal jurisdiction over non-Indians who settled on Indian land and committed crimes.[5]

Although the primary means of dealing with the Indian tribes during this period was by treaty, during the first half of the 19th century the increasing conflict between Indians and non-Indians encroaching on Indian territory impelled the U.S. Congress to assert Federal jurisdiction by statute over criminal offenses between non-Indian perpetrators and Indian victims and Indian perpetrators and non-Indian victims. The rationale for this Federal assumption of jurisdiction was said to be the need to protect the Indian tribes, and the territory and rights promised to them by treaty, from the lawlessness of white settlers and adventurers.

A series of Indian trade and intercourse acts, which were revised and reenacted, culminated in the General Crimes Act, section 25 of the Trade and Intercourse Act of 1834, which provided:

> That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: Provided, the same shall not extend to crimes committed by one Indian against the person or property of another Indian.[6]

By this statute, the U.S. Congress asserted Federal jurisdiction over offenses between Indians and non-Indians. Significantly, the General Crimes Act did not deprive Indian tribes of concurrent jurisdiction with the Federal Government over offenses committed between Indians and non-Indians. Further, it specifically preserved to the tribes exclusive jurisdiction over even the most serious of offenses if both the perpetrator and victim were Indians.

During the first three-quarters of the 19th century, the Federal Government left the Indian tribes relatively undisturbed in the maintenance of law and order in regard to their own members. The various tribal societies had varying systems for the maintenance of order, but some generalizations could nevertheless be made:

> Many different systems existed for resolving disputes and maintaining order. Some tribes had warrior societies which functioned as enforcement mechanisms, other tribes utilized community pressure to enforce norms; scorn is said to have been an extremely effective method of enforcement. Imprisonment was unknown, and restitution, banishment, and death were the major retributive sanctions.[7]

During this period, however, white settlers and fortune seekers encroached in increasing numbers

[2] 30 U.S. (5 Pet.) 1 (1831).
[3] 31 U.S. (6 Pet.) 515 (1832).
[4] Wilcomb E. Washburn, "The Historical Context of American Indian Legal Problems," *Law and Contemporary Problems*, vol. 40 (1976), p. 17.
[5] Robert N. Clinton, "Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective," *Arizona Law Review*, vol. 17 (1975), p. 952. A list of these treaties is on p. 954, n. 19.
[6] Act of June 30, 1834, ch. CLXI, §25, 4 Stat. 733. The successor to the General Crimes Act is now codified at 18 U.S.C. §1152 (1976) (also known as the Federal Enclave Act).
[7] U.S., Congress, American Indian Policy Review Commission, Task Force Four, *Report on Federal, State, and Tribal Jurisdiction, Final Report* (July 1976), pp. 121-22 (hereafter cited as *Task Force Four Report*).

upon the territories reserved for the Indian tribes, and the Federal Government became increasingly unwilling or unable to fulfill its guarantees of protection. The Federal Government's failure to live up to its treaty obligations has been described:

> The destruction of many of the reservations at the end of the nineteenth century resulted from a similar expedient response to the pressure of white settlers on the reservations created in the 1840's. The crisis came to a head in the 1870's with the continuing rapid expansion of white population. The new weapon in the white arsenal was the railroad, which provided a physical presence of white power in the heart of the Indian country and guaranteed rapid movement of white military power wherever needed. Indian lands, though seemingly protected by the treaties negotiated in the 1840's and 1850's, were increasingly subject to invasion by undisciplined and unregulated frontiersmen.
>
> Miners rushed into the Black Hills of the Sioux Reservation in search of gold. Stockmen and settlers invaded the homelands of the Utes of Wyoming and the Nez Perce of Washington and Idaho. Even the Indian Territory, inhabited by Indians who had been coerced or induced into moving west to form the prototype of a separate Indian state or territory, was under constant threat of invasion by white ruffians perched on its borders. The outcome of this pressure was occasionally war. Chief Joseph and his Nez Perce were humbled and defeated in 1877. Even the Sioux, though they destroyed George Custer's Seventh Cavalry Regiment, gained only temporary satisfaction before being crushed by larger forces. These military confrontations were the outward expressions of a crisis that seemed to men of both good and ill will to require radical solutions.[8]

The solution chosen by the Federal Government in response to the crisis was not a more vigorous enforcement of treaty provisions that guaranteed protection of Indian lands from encroachment. Instead, a solution was devised to divide the communally held reservation lands into individual parcels or allotments to be conveyed to individual Indians, with remaining "surplus" land to be made available to white settlers.[9]

Even at the time the benefits of the policy of allotment were being propounded, there were dissenters. The minority of the House Committee on Indian Affairs expressed doubt that the mere possession of a small amount of land could transform Indians into model American farmers. The minority report on the allotment legislation condemned the motives underlying the movement:

> The real aim of this bill is to get at the Indian lands and open them up to settlement. The provisions for the apparent benefit of the Indian are but the pretext to get at his lands and occupy them. . . .If this were done in the name of greed, it would be bad enough; but to do it in the name of humanity, and under the cloak of an ardent desire to promote the Indian's welfare by making him like ourselves, whether he will or not, is infinitely worse.[10]

Allotment was accomplished under a complex scheme of statutes and treaties. On many reservations, there remained "surplus" lands after the eligible Indians had received their allotments. These lands were sold by the Federal Government to white settlers.

In 1871 Crow Dog, a Sioux Indian, killed Spotted Tail, a Brule Sioux chief, and was dealt with by the traditional tribal justice system, which imposed a requirement of restitution and support of the victim's family. Notwithstanding, Crow Dog was brought before a Federal court in South Dakota, convicted of murder, and sentenced to death. On a writ of habeas corpus, the United States Supreme Court reversed, applying the law and longstanding Federal policy to find that the tribe had exclusive authority over offenses committed by its own members. In interpreting the treaty between the United States and the Sioux, the Court affirmed the duty of the United States to protect the self-government of the tribe:

[8] Washburn, "The Historical Context," pp. 17–18.

[9] "The supreme aim of the friends of the Indian was to substitute white civilization for his tribal culture, and they shrewdly sensed that the difference in the concepts of property was fundamental in the contrast between the two ways of life. That the white man's way was good and the Indian's was bad, all agreed. So, on the one hand allotment was counted on to break up tribal life." Otis, "History of the Allotment Policy," quoted in Felix S. Cohen, *Handbook of Federal Indian Law* (Albuquerque, N.M.: University of New Mexico Press, 1971), p. 208. It must also be noted that while the advocates of allotment were primarily and sincerely concerned with the advancement of the Indian, at the same time they regarded the scheme as promoting the best interests of the whites as well. For one thing, it was hoped that setting the Indian on his own feet would relieve the Government of a great expense. In 1879 the Indian Commissioner, in recommending an allotment bill to Secretary Schurz, wrote, "The evidently growing feeling in the country against the continued appropriations for the care and comfort of the Indians indicates the necessity for a radical change of policy in affairs connected with their lands." Ibid.

[10] U.S., Congress, 46th Cong., 2d. sess., May 28, 1880, H. Rept. 1576, p. 10, as quoted in Cohen, *Handbook of Federal Indian Law*, p. 209.

> The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that *among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.* [11] (emphasis added)

The *Crow Dog* decision had the apparent effect of inflaming the public and the U.S. Congress. Convinced that the traditional tribal justice systems were incompatible with the goal of "civilizing" Indians, Congress moved to extend white man's law to intratribal crimes. Representative Bryon M. McCutcheon (R–Mich.) introducing what was to become the Major Crimes Act as an amendment to an appropriations bill, stated:

> Mr. Chairman, I believe it is not necessary for me to say that this amendment is in the direction of the thought of all who desire the advancement and civilization of the Indian tribes. . . .I believe we all feel that an Indian, when he commits a crime, should be recognized as a criminal, and so treated under the laws of the land. I do not believe we shall ever succeed in civilizing the Indian race until we teach them regard for law and show them that they are not only responsible to the law, but amenable to its penalties. . . .It is infamy upon our civilization, a disgrace to this nation, that there should be anywhere within its boundaries a body of people who can, with absolute impunity, commit the crime of murder, there being no tribunal before which they can be brought for punishment.[12]

The legislation empowered Federal courts to try and punish Indians for the commission of seven specified crimes on Indian reservations—murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.[13]

The constitutionality of the Major Crimes Act was soon tested in the U.S. Supreme Court in an appeal of two Indians convicted by a Federal court of murdering another Indian on the Hoopa Valley Reservation in California. In upholding the law, the Court specifically declined to rely on the clause in the Constitution that gives Congress "power to regulate commerce. . .with the Indian tribes,"[14] as authorizing Federal regulation of the internal relations among Indian tribes. Instead, the Court relied on the status of Indians as wards of the Nation. The Court emphasized the long history of animosity of the States toward the Indian tribes and their condition of helplessness, giving rise to both the duty and authority of the Federal Government to provide protection:

> It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependen. largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.[15]

The Federal duty of protection explicated in *Kagama* appeared to justify Federal criminal jurisdiction to the exclusion of the States.

> The Power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed any where else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.[16]

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[11] Ex parte Crow Dog, 109 U.S. 556, 568 (1883) (emphasis added).

[12] 72 Cong. Rec. 934 (Jan. 22, 1885).

[13] Act of Mar. 3, 1885, ch. 341, §9, 23 Stat. 385. Since the enactment of the Major Crimes Act in 1885, seven additional crimes have been added to its coverage: incest, carnal knowledge of a female under the age of 16, assault with intent to commit rape, assault with a dangerous weapon, assault resulting in serious bodily injury, robbery, and kidnapping, making a total of 14. 18 U.S.C. §1153.

[14] U.S. Const., Art. I, Sec. 8.

[15] U.S. v. Kagama, 118 U.S. 375, 383–84 (1886) (emphasis added).

[16] *Id.* at 384–85. It has been pointed out "that the tribes did not request the alleged 'protection' of the Major Crimes Act which was imposed upon

Even while the Supreme Court spoke of the Federal duty of protection, the executive branch was taking measures to break up the traditional forms of tribal governments and Indian culture as impediments to the "civilization" of the Indian. In the 1880s and 1890s, the Secretary of the Interior established Indian police forces and "Courts of Indian Offenses" on the various reservations for the purpose of maintaining order and suppressing the authority of the traditional chiefs. Under the code established by the Secretary of the Interior for these courts, traditional religious practices and customs were made illegal, including ritual dancing and mourning practices.[17]

The Court itself during this period also contributed to the decline of tribal governmental powers. The power of tribes to deal with offenses committed by non-Indians on Indian reservations had been almost completely eroded by decisions of the United States Supreme Court. A line of cases held that a State has exclusive jurisdiction over offenses committed by a non-Indian against a non-Indian victim on an Indian reservation located within the boundaries of a State.[18]

Beyond the economic consequences of the loss of Indian land, detailed elsewhere,[19] this era in Indian policy, particularly allotment, set the stage for intense jurisdictional conflicts that have continued to the present time. On many Indian reservations, particularly in the West and Midwest, the legacy from the allotment period is a significant number of non-Indians residing within reservation boundaries and owning a large amount of land that is interspersed with tribal land and population. Often within the boundaries of a reservation, different classes of land are intermixed, including trust land owned by the tribe, trust land owned by individual Indians, fee patent land owned by Indians, fee patent land owned by non-Indians, and lands under the control of Federal instrumentalities such as the Corps of Engineers. The issue of whether and under what circumstances the State, the tribe, or the Federal Government can exert jurisdiction over land held by Indians and non-Indians became, and still is, the subject of legal and political struggle.

By the 1920s it had become clear to policymakers that Plains Indians were adhering to their tribal identities and not becoming prototypical American farmers. In fact, their economic situation was drastically declining, caused in large part by the policy of allotment. Federal policy again reversed itself in the 1930s, marked by a "motive of righting past wrongs inflicted upon a nearly helpless minority."[20]

Under the new Federal policy, Congress abandoned attempts at assimilation and the destruction of tribal structure and adopted measures to revitalize tribal self-government, conserve and enhance tribal lands and resources, and reaffirm the Federal trust relationship with Indian tribes. Under the Indian Reorganization Act of 1934 (IRA),[21] allotment of Indian lands was prohibited and programs were initiated to reacquire land for existing reservations to be placed in Federal trust status.

The act contained provisions to restore the status and promote the development of tribal self-government. Tribes that voted to accept the act were given the opportunity to adopt written constitutions for their governmental structures, subject to tribal ratification under the supervision of the Secretary of the Interior. The pervasive influence of the Interior Department in the development and implementation of tribal governing structures under the act has been described:

> Section 16 of the IRA was silent, however, concerning the procedures for drafting constitutions and the governing structures to be established thereby. It specified only that each constitution must contain certain tribal prerogatives usurped during the allotment era, as well as "all powers vested in any Indian tribe or tribal council by existing law." Some tribes had adopted written organic documents prior to 1934. However, for most of these tribes, as well as for the majority of Indians functioning without such documents, constitutional government was a novel experience. This inexperience, combined with a lack of access to necessary legal assistance, left few tribes in a position to develop their own constitutions.
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> Consequently, the Interior Department prepared a model constitution following passage of IRA. The boilerplate provisions of this model were adopted with few alterations by virtually all tribes which voted to organize under that Act. Thus, although IRA was designed to

them unilaterally by Congress." American Indian Lawyer Training Program, *Indian Self-Determination and the Role of Tribal Courts* (1977), p. 19, n. 19 (hereafter cited as *Role of Tribal Courts*).

[17] *Role of Tribal Courts*, pp. 17–18.

[18] United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896).

[19] See chapter 2.

[20] Cohen, *Handbook of Federal Indian Law*, p. 83.

[21] Act of June 18, 1934, 48 Stat. 984, *as amended*, 25 U.S.C. §§461–486 (1976).

> restore residual powers of tribal sovereignty, the extent and exercise of those powers were determined largely by the Interior Department, not the tribes.[22]

The great significance of the IRA in ending the disastrous allotment policy and in assisting the revitalization of tribal self-government can hardly be overstated. As a measurable effect, Indian landholdings were increased by 4 million acres between 1933 and 1949.[23] Notwithstanding the beneficial effects of the act for the preservation and development of Indian tribal governments and resources, tribes were unable to undo the results of the previous assimilationist policy of allotting substantial amounts of reservation land to non-Indian ownership.

Beginning in the early 1950s and lasting into the 1960s, the United States returned to a policy that favored ending the special relationship between the Federal Government and the Indian.

The policy, which became known as "termination," had three major legislative components: the specific termination of approximately 100 tribes and rancherias,[24] an aggressive relocation policy to encourage migration from reservation areas to urban centers, and the transfer to States of Federal jurisdiction over reservation areas. Now repudiated, the termination policy has left its mark on present jurisdictional conflicts between tribes and States. The legislative vehicle for transfer of jurisdiction was Public Law 280,[25] a complicated statute devised as "an attempt at compromise between wholly abandoning the Indians to the states and maintaining them as federally protected wards, subject only to federal or tribal jurisdiction."[26]

In congressional debates leading to enactment of Public Law 280, the principal concern of Congress appeared to be the threat to non-Indians occasioned by the perceived lawlessness on Indian reservations and inadquate Federal law enforcement. Transferring jurisdiction for law enforcement from the Federal Government to the States was not an exclusive remedy available to Congress, if the real issue were the quality of law enforcement, as a commentator has noted:

> The B.I.A. could have encouraged greater use of existing cooperative agreements between the tribes and state law enforcement officials which permitted the states to make arrests for the most widespread and troublesome Indian crimes; the Justice Department could have deputized more state officials; and the federal government could have strengthened federal law enforcement efforts or offered financial and technical assistance to enable the tribes to develop their own courts and other law enforcement machinery. Any of these solutions might have been attempted had the goal of Congress been merely to improve law enforcement services pending the development of adequate tribal institutions. State criminal jurisdiction was preferred to other alternatives, however, because it was the cheapest solution; Congress was interested in saving money as well as bringing law and order to reservations.[27]

In the belief of some, the actual underlying motive behind the States' move to acquire jurisdiction over Indian lands was the historical desire for economic and political control:

> [A]nd finally, the question: Why do states want the additional responsibility of jurisdiction over Indian reservations with all the added costs this would incur? This answer too is simple. Above all they are interested in "control." Control over the territory or lands of the Indian tribes. Why do they want this control? Because, since the first European set foot on the eastern shore, the non-Indian population of America has coveted the Indian's land.[28]

Public Law 280 divided States into three basic categories with specific sections as to how they might assume jurisdiction over Indian tribes within their borders. Six States were given direct civil and criminal jurisdiction over reservations within their borders, with the exception of a few enumerated tribes.[29] States that had specific provisions in the constitutions disclaiming jurisdiction over Indian land were empowered to assume civil or criminal jurisdiction, or both, after amending their constitu-

[22] *Role of Tribal Courts*, pp. 23–24 (notes omitted).
[23] U.S., Department of the Interior, *Report of the Secretary of the Interior* (1949), p. 380, cited in Felix S. Cohen, "The Erosion of Indian Rights: A Case Study in Bureaucracy," *Yale Law Journal*, vol. 62 (1953), p. 363, n. 58.
[24] *See, e.g.*, 25 U.S.C. §§677, 677a (Ute), 691–708 (Western Oregon Tribes) (1976).
[25] Act of Aug. 15, 1953, Ch. 505, 67 Stat. 588–90 (now codified at 18 U.S.C. §1360 and 28 U.S.C. §1360 (1976).
[26] Carole Goldberg, "Public Law 280: The Limits of State Jurisdiction Over Reservation Indians," *U.C.L.A. Law Review*, vol. 22 (1975), p. 537 (hereafter cited as *Public Law 280: The Limits of State Jurisdiction*).
[27] Ibid., p. 542 (notes omitted).
[28] Wayne Ducheneaux, chairman, Cheyenne River Sioux Tribe, statement, Hearing on S. 2010 Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 94th Cong., 1st sess., 1975, quoted in *Task Force Four Report*, p. 5.
[29] Alaska (upon achieving statehood), California, Oregon, Minnesota, Nebraska, and Wisconsin.

tional disclaimers and enacting appropriate legislation.[30] States without such jurisdictional disclaimers in their constitutions were permitted to assume civil and criminal jurisdiction upon enactment of enabling State legislation.

Congress did, however, retain some Federal jurisdiction. Areas specifically excluded from State control included alienating, taxing, or probating trust property and infringement upon hunting, fishing, and trapping rights. However, Public Law 280 did not provide for tribal consent prior to State assumption of jurisdiction. Several tribes did, in fact, object to Congress, and a few did manage to be excluded on the basis of "tribal law enforcement systems that functioned in a reasonably satisfactory manner."[31]

The legislation dissatisfied both the States and the tribes. Indian tribes objected in particular to the imposition of State jurisdiction against their will. The States objected to the lack of Federal financial aid to enable them to carry out their new responsibilities, and they objected particularly to the remaining Federal protections that deprived them of the ability to tax the property of reservation Indians.

As a predictable result, State assumption of criminal jurisdiction under Public Law 280 led to inadequate and discriminatory law enforcement. In some cases States assumed jurisdiction over Indian reservations from the Federal Government without allocating any additional resources for law enforcement. Joseph De La Cruz, president of the Quinault Indian Nation, described the situation in Washington State occasioned by the assumption of State jurisdiction:

> If there was a violation on an Indian reservation by a citizen other than an Indian, we had to depend on and hope that a county sheriff would come down from 30, 40 miles down the road and on some reservations even farther, so you had no jurisdiction, you had a vacuum. . . .
>
> Through those years [when the State legislature was enacting legislation to assume Public Law 280 jurisdiction over Washington Indian reservations], there were [press] clippings of the various county and city governments and their lack of money and personnel to take care of their own, yet the State was assuming jurisdiction on these Indian reservations.[32]

The Omaha and Winnebago reservations in Nebraska were left without any law enforcement provided by the State once Federal officers withdrew. A member of the Omaha Tribe reported:

> We had some killings going on there, one right on Main Street which could have been prevented if we had law and order. . . .We had a special deputized sheriff for a while until they claimed that he arrested so many Indians. None of them could pay their fine, and they had to lay it out in the jail. They said just that by keeping Indians they couldn't afford to furnish us with a deputy.[33]

Antagonism toward Indians was viewed as contributing to the lack of law enforcement services provided by States to Indian communities under the jurisdiction of Public Law 280. Chief Jim Johnson of the Colville Tribal Police Department in Washington State told a task force of the American Indian Policy Review Commission in 1976 that county law enforcement authorities repeatedly failed to respond to complaints of felonies committed on the reservation.[34] A tribal official of the Minnesota Chippewas told the task force: "One deputy sheriff in Itasca County told me also, he said if all those Indians would kill each other, then we wouldn't have to go up there."[35]

In regard to discriminatory law enforcement favoring non-Indians, the American Indian Policy Review Commission reported that there was a "persistent complaint that even where law enforcement services are provided on the reservation, the police are less than willing to enforce the law against non-Indians."[36] There have been widespread reports of discriminatory law enforcement practices against Indians in bordertowns adjacent to reservation areas where States have criminal jurisdiction over Indians.[37]

[30] The eight States are: Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington.

[31] For example, the Warm Springs Reservation in Oregon and the Red Lake Reservation in Minnesota.

[32] Testimony, *Hearing Before the U.S. Commission on Civil Rights, Seattle, Washington*, Oct. 19–20, 1977, p. 46 (hereafter cited as *Seattle Hearing*, vol. I).

[33] As quoted in *Public Law 280: The Limits of State Jurisdiction*, p. 552, n. 92.

[34] *Task Force Four Report*, pp. 16–17.

[35] Ibid., p. 16.

[36] Ibid.

[37] See, e.g., U.S., Commission on Civil Rights, *Southwest Indian Report* (1973); New Mexico Advisory Committee to the U.S. Commission on Civil Rights, *The Farmington Report: A Conflict of Cultures* (1975); South Dakota Advisory Committee to the U.S. Commission on Civil Rights, *Liberty and Justice for All* (1977).

The effect of Public Law 280, then, was to expose Indians to a far greater extent to State jurisdiction, with particular vulnerability in communities where racial animosities were intense. In response to complaints from tribes that Public Law 280 was inherently defective as an infringement on tribal sovereignty and operationally defective because State jurisdiction did not provide effective or fair law enforcement, Congress made a limited number of corrective amendments in the Indian Civil Rights Act of 1968.[38]

The act provided that from its effective date any further assumptions of State jurisdiction would require the consent of the affected tribe. The Indian consent provision, however, was not made retroactive and thus existing assumptions of State jurisdiction were not affected. In response to the States' perceived financial difficulties with Public Law 280, the act further provided that jurisdiction obtained by State governments could be retroceded or returned to the Federal Government, in whole or in part, upon request from a State and approval by the Secretary of the Interior. No similar mechanism was provided, however, by which an Indian tribe could initiate and force retrocession upon a State that wished to retain jurisdiction.

Thus, in those States that assumed jurisdiction over Indian lands pursuant to Public Law 280 prior to 1968, and in which retrocession has not occurred, persistent legal, political, and economic issues remain today concerning the scope of the powers that Public Law 280 confers on the States in relation to the tribes and the Federal Government, particularly in the area of land use regulation and taxation.[39]

The amendments regarding Public Law 280 jurisdiction in the Indian Civil Rights Act of 1968 signaled in part a recognition of the failures of the termination policy and its rejection by the Federal Government. This was made explicit by another portion of the 1968 legislation. Although not expressly limiting crimes that can be tried in tribal courts, it limited the punishment to no more than 6 months' imprisonment or a $500 fine.[40] Thus only prosecutions in Federal court can result in sanctions of the severity that the serious felony offenses covered by the Major Crimes Act would seem to require.

[38] 25 U.S.C. §§1321-26 (1976).
[39] The current jurisdictional conflicts are discussed below.
[40] 25 U.S.C. §1302(7) (1976). The act also prescribes certain procedural requirements for prosecutions in tribal courts similar to those imposed by the United States Constitution for State and Federal prosecutions.

The Direct Federal Role

The Federal Government has primary responsibility for the investigation and prosecution of serious crimes that occur in Indian country and for the protection of Indian communities from non-Indian offenders. This primary role is the product of a piecemeal historical development that has, on the one hand, expanded Federal court jurisdiction and, on the other, deprived the tribes of critical areas of functioning.

Serious felony offenses committed by Indians in Indian country fall within the scope of the Major Crimes Act,[41] which gives the Federal courts jurisdiction over 14 enumerated crimes. These crimes are murder, manslaughter, rape, carnal knowledge of a minor not a spouse, assault with intent to commit rape, incest, assault with intent to kill, assault with a deadly weapon, assault resulting in serious bodily injury, arson, burglary, robbery, larceny, and kidnapping—the offenses constituting the greatest threat to the public safety of any community.

The Federal Government also has jurisdiction over all offenses committed on an Indian reservation by a non-Indian offender against an Indian victim and an Indian offender against a non-Indian victim. The Federal Enclave Act[42] extends Federal court jurisdiction to all Federal criminal law applicable to Federal enclaves, including the Assimilative Crimes Act, which applies the law of the surrounding State to the Federal enclave located within its borders.

The Federal Government also has jurisdiction over a number of offenses committed on Indian reservations falling under specific Federal statutes. Of major importance are 18 U.S.C. §1156, proscribing violations of tribal hunting and fishing regulations, and 18 U.S.C. §1159, proscribing violations of tribal liquor laws.

Tribal governments have a measure of jurisdiction over criminal offenses committed within Indian country. Tribes have criminal jurisdiction solely over Indians committing offenses on Indian reservations. The U.S. Congress has imposed a limitation on possible sanctions imposed by tribal courts of 6 months' imprisonment or a $500 fine, which serves as a practical matter to confine tribal courts to misdemeanor offenses. By decision of the U.S.

[41] 18 U.S.C. §1153 (1976).
[42] 18. U.S.C. §13 (1976).

Supreme Court, tribal courts are precluded from trying and punishing non-Indian offenders.[43]

The States also have a limited amount of jurisdiction over offenses committed in Indian country.

Participants in the Law Enforcement Role

With the extensive scope of Federal jurisdiction over criminal offenses in Indian country and the stringent limitations placed on tribal jurisdiction, it is evident that an effective Federal law enforcement effort is essential to the well-being and safety of Indian communities. The roles of the various institutional participants in the Federal law enforcement effort are complex and interrelated, but may be delineated in summary.

Tribal Police

Procedures for handling the investigation of serious felony offenses under the Major Crimes Act vary from reservation to reservation, according to the policing structure, but a general pattern exists. Ordinarily, a tribal officer or a BIA patrol officer will be the first on the scene, and if he or she determines that a serious offense is involved will call the BIA special officer. The special officer will conduct an initial investigation of varying scope and then notify the FBI, who will take over investigation of the offense and presentation of the case to the United States attorney for prosecution. The Department of Justice Task Force in its 1975 report described the usual practice:

> The BIA has trained criminal investigators (special officers) on most reservations. These special officers conduct the initial investigation for the majority of serious crimes which occur on Indian reservations. Most U.S. Attorneys, however, will not normally accept the findings of a BIA special officer as a basis for making a decision on whether to prosecute. Instead, most U.S. Attorneys require that the FBI conduct an independent investigation, often duplicative of the BIA investigation, prior to authorizing prosecution.[44]

The Federal Bureau of Investigation

The FBI does not function as a local police agency on Indian reservations. Its role is to investigate violations of Federal law, particularly the Major Crimes Act, which covers most serious felony offenses committed on Indian reservations. The FBI does not have agents stationed on Indian reservations, and in some cases the nearest resident agency to an Indian reservation is more than 100 miles away.[45] The Justice Department's Task Force describes this procedure:

> [A]n FBI agent must travel to the reservation, often a considerable distance away, and retrace the investigation which has been conducted by the BIA. FBI agents normally reinterview all persons involved, visit the crime scene, and review and examine all evidence. Until the FBI investigation is completed, the offender typically remains at large.[46]

The role of the FBI in the investigation of Federal offenses on Indian reservations is not required by statute but developed when the BIA lacked staff during the Second World War. The Department of Justice Task Force described the background for the FBI's now primary investigative responsibilities in Indian country:

> At one time BIA special officers did all of the investigations of federal violations occurring in Indian country. . . .
>
> In the 1940's and 1950's, special officer manpower was reduced and the BIA was not able to provide the investigative services it had historically provided, During this period the FBI assisted the BIA in meeting its responsibility. Initially, the FBI participated only in the more serious offenses upon the request of the agency special officer, often after a preliminary investigation. Over the years, the precedent for reporting to the FBI all violations of federal law in Indian country was established. Due to the operating policies and general leadership role in the federal law enforcement field of the FBI, it assumed the role of the primary investigative agency on offenses accepted for investigation and made prosecutive presentation of the cases to the appropriate U.S. Attorney although BIA

[43] Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978).

[44] U.S., Department of Justice, *Report of the Task Force on Indian Matters* (1975), p. 34 (hereafter cited as *Department of Justice Task Force Report*).

[45] For example, the Standing Rock Sioux Reservation lies in both North Dakota and South Dakota. For offenses occurring in the North Dakota portion of the reservation, FBI agents must respond from Bismarck, which is 75 miles away. For offenses occurring in the South Dakota portion, agents must respond from Aberdeen, which is 150 miles away. (Henry Gayton, testimony, *Hearing Before the U.S. Commission on Civil Rights, Rapid City, South Dakota*, July 27-28, 1976, pp. 171-72 (hereafter cited as *South Dakota Hearing*).) For offenses occurring on the Pine Ridge Reservation in South Dakota, FBI agents must respond from Rapid City, which is about 125 miles away. (Fred Two Bulls, ibid., p. 173.)

[46] *Department of Justice Task Force Report*, p. 34.

special officers generally provided the bulk of the investigative effort. Accordingly, U.S. Attorneys came to rely solely on FBI investigative reports and prosecutive presentations. The BIA has assumed a *de facto* supportive role in spite of the fact that it is regarded as having primary general responsibility for reservation law enforcement.[47]

The United States Attorneys

Federal prosecution of criminal cases on Indian reservations is handled by the United States attorneys of the Federal districts in which the reservations are found. Thus, in addition to their normal responsibilities for prosecuting Federal offenses under the United States Code, they must function as local prosecutors for Indian reservations. Because of the jurisdictional restrictions on tribal courts, if the U.S. attorney fails to take action against an offender, ordinarily no action will be taken in any system.

The BIA and Tribal Police and Investigators

The day-to-day responsibility for reservation law enforcement generally rests with tribal or Bureau of Indian Affairs police stationed on the reservation. Indian tribes have varying arrangements for preserving law and order. Most tribes have tribal police departments whose officers are paid either with tribal funds or with BIA funds or with BIA funds that have been awarded to the tribe on a contract basis pursuant to the Indian Self-Determination Act.[48] In addition, most reservations also have BIA police and investigators.

In addition, the BIA has stationed on most reservations "agency special officers," who are trained criminal investigators. These special officers ordinarily report to the scene of serious offenses and conduct an initial investigation, prior to the involvement of the FBI.

The Department of the Interior

The Bureau of Indian Affairs of the Department of the Interior maintains within its Washington headquarters a Division of Law Enforcement Services that provides technical assistance and advice to BIA and tribal police forces. The Division Chief, however, has no direct operational control over BIA police. Under the decentralized BIA structure, the BIA police and investigators on a particular reservation will report to the reservation BIA superintendent.

The Department of Justice

Oversight for the Justice Department's criminal prosecutions and investigations, including those in Indian country, is handled by the Deputy Attorney General. Key divisions under his direction include the Executive Office of United States Attorneys, the Criminal Division, the FBI, and the Law Enforcement Assistance Administration (LEAA).

Primary responsibility for criminal prosecutions rests with individual United States attorneys whose districts contain Indian country, and their exercise of discretion is not limited or monitored to any great degree within Department of Justice headquarters. Some support and technical assistance is provided to them by the Executive Office of U.S. Attorneys and the General Crimes Section of the Criminal Division.

The States

Except in States that have acquired jurisdiction pursuant to Public Law 280,[49] the States play a very limited role in law enforcement on Indian reservations. State jurisdiction is ordinarily limited to reservation crimes where both the offender and the victim are non-Indian.[50] Some tribes have formal or informal cross-deputization arrangements with State police for traffic and other offenses, in which Indian offenders are cited into tribal court and non-Indians into State court.

The Performance of Enforcement Responsibilities

Federal law enforcement in Indian country has generated massive dissatisfaction from a number of sources over a period of years. In the 1950s, the view of Congress that Federal law enforcement on Indian reservations was inadequate was the impetus for enactment of Public Law 280, which transferred criminal and civil jurisdiction on a number of reservations from the Federal Government to the States.

In the current period of a Federal policy of Indian self-determination, criticism of Federal law enforcement has continued and intensified. In 1974 the American Indian Court Judges Association conduct-

[47] Ibid., pp. 34–35.
[48] 25 U.S.C. §§450–450N (1976).
[49] For discussion of State jurisdiction under Public Law 280, see *Task Force Four Report.*
[50] The handling of non-Indian offenders on Indian reservations is discussed in a following section of this chapter, "Jurisdiction Over Non-Indians—Federal Inaction."

ed a nationwide study of Federal law enforcement and found confusion and lack of coordination among the Federal agencies involved and profound dissatisfaction among the Indian communities who are the recipients of Federal services.[51]

Following the Wounded Knee uprising on the Pine Ridge Reservation, the Department of Justice convened an Intra-agency Task Force on Indian Matters to examine the execution of its responsibilities toward Indians, particularly law enforcement on Indian reservations. Participating in the Task Force were the Criminal, Civil Rights, Land and Natural Resources, and Tax Divisions; the Federal Bureau of Investigation; U.S. Marshals Service; Community Relations Service; Law Enforcement Assistance Administration; Office of the Solicitor General; Executive Office of United States Attorneys; and Office of Management and Finance. The Task Force was chaired by the Office of Policy and Planning.

The Department of Justice Task Force on Indian Matters issued its report in October 1975 with grave conclusions for the quality of the Federal law enforcement effort. The Task Force noted that examination of law enforcement had long been neglected and that the neglect itself was properly a matter of criticism:

> The reservation law enforcement issue has suffered inattention and neglect. The problem is one of major proportion crossing many bureaucratic and jurisdictional boundaries. It is particularly embarrassing that the present problem exists in an area of primarily federal responsibility. This is not a situation where the federal government serves as a model for other law enforcement efforts.[52]

The American Indian Policy Review Commission of the U.S. Congress evaluated Federal policies and programs in relation to American Indians. In its 1976 report, the Policy Review Commission's Task Force on Federal, State, and Tribal Jurisdiction was highly critical of Federal investigation and prosecution of offenses occurring in Indian country. Its analysis was generally consistent with that of the earlier Department of Justice Task Force.[53]

The inquiry of the United States Commission on Civil Rights into these issues occurred from August 1977 through August 1979. The Commission held hearings in Washington State, South Dakota, and Washington, D.C., and conducted field interviews and investigations in many parts of the country. The data and information collected on Federal law enforcement corroborates, for the most part, the findings and recommendations made by the Department of Justice Task Force 4 years earlier.

Complaints expressed by the various agencies and investigative bodies about Federal law enforcement fall into three categories:

(1) **Statistics:** The statistics kept by the Federal Government regarding law enforcement on Indian reservations do not permit accurate analysis or systematic monitoring of the quality of law enforcement.

(2) **Investigation:** The FBI's role in investigating offenses occurring in Indian country for the most part results in delay and duplication of efforts by BIA and tribal investigators; and, further, the FBI's effectiveness is hampered by a widespread perception within the Indian community that the FBI is engaged in activities to suppress militant political activity on the part of organizations and individuals.

(3) **Prosecution:** It takes the U.S. attorneys too long to respond when a crime under Federal jurisdiction has been committed, and such a high percentage of cases are declined for prosecution that crimes on Indian reservations go virtually unpunished.

Statistics

A long-recognized impediment to analysis of the problems affecting Federal law enforcement on Indian reservations has been the lack of any system for generating factual information that would provide a precise base for identifying and monitoring the status of investigations and prosecutions on an ongoing basis. In 1974 the American Indian Court Judges Association conducted a nationwide study of Federal prosecution of crimes committed on Indian reservations. Its efforts, however, were substantially thwarted by the failure of Federal agencies to keep statistics that would permit analysis and identification of problem areas. In its report, the association made a strong plea for the maintenance of accurate statistics by the Federal Government as a basis for evaluating and ensuring the quality of the Federal law enforcement effort:

[51] American Indian Court Judges Association, *Justice and the American Indian*, vol. 5 (1974), "Federal Prosecution of Crimes Committed on Indian Reservations" (hereafter cited as "Federal Prosecution on Indian Reservations").

[52] *Department of Justice Task Force Report*, p. 24.

[53] *Task Force Four Report*.

> Investigation of the subject [Federal prosecution of crimes committed on Indian reservations] soon revealed, however, what has become a strong secondary theme—the lack of, yet imperative need for, accurate and adequate statistics. . . .[W]ithout adequate statistics, it is too easy for Indian communities to be told that their arguments are based on isolated examples, that nothing can be done if they don't have figures to support their contentions, and that funds cannot be appropriated and changes cannot be made without strong proof (meaning statistical proof) of express need.
>
> Thus, if the inadequacy or unavailability of statistics concerning federal prosecution of crimes committed on Indian reservations seems strongly stressed in this paper, it is only because individuals and agencies responsible for making decisions ask first to see numbers. . . .[A]s an indication of the status of federal prosecution of crimes committed on Indian reservations, as a call for adequate record-keeping, and as an appeal for remedial action, this document is an important work. The National American Indian Court Judges Association stands ready to help in any way it can to improve this area of the Indian criminal justice system.[54]

The "remedial action" sought by the American Indian Court Judges Association in the collection and maintenance of accurate statistics was never forthcoming. The lack of accurate statistics continues to bar effective analysis of the problems of Federal law enforcement, even by the Federal agencies themselves.

Indeed, the Task Force on Indian Matters of the Department of Justice noted in its 1975 report that the Department's system for collecting statistics made analysis of the rate of declinations of prosecution "extremely difficult":

> Statistical analysis on the subject of declinations is extremely difficult and unreliable. The U.S. Attorneys' Reporting and Docketing System maintained by the Justice Department includes figures on the numbers of matters filed by U.S. Attorneys under 18 U.S.C. §§1152 and 1153, and their disposition. However, it does not include the number of matters presented to U.S. Attorneys under these statutes.
>
> The BIA maintains records on crime in Indian country, but they are maintained on a Uniform Crime Report index format. Their records do not reflect the statutory areas under which charges are presented to the U.S. Attorneys. The same is true for the FBI. Its records do not distinguish between crimes on Indian reservations (CIR) and crimes on other government reservations (CGR).[55]

The present Director of the Federal Bureau of Investigation, William H. Webster, noted the impossibility of responding to requests for information from the U.S. Commission on Civil Rights because of lack of statistical information:

> I realize it must be frustrating to you to have the people that you ask not give you the kind of figures that will help you draw meaningful conclusions.
>
> Our major crimes program falls within our general crimes program, and it is the general crimes that we keep figures on. We really weren't trying to figure out the difference between an Indian reservation and some other place.
>
> So the nature of our current statistics doesn't provide us with the ability to ask the computer the kinds of questions you would like to answer.[56]

In response to an inquiry from the Commission, the FBI surveyed its 15 field offices with responsibilities in Indian country about the number and type of referrals for investigation of offenses falling under the Major Crimes Act and their disposition for the period July 1977 to May 1978.[57] These data, however, are not collected or monitored regularly on a national basis. Moreover, the data concern entire field divisions of the FBI and is not divided or distinguished by offenses occurring on individual Indian reservations within a division, thus making them of little use for analysis of such matters as crime rates on individual reservations and the effectiveness of the law enforcement effort.

The American Indian Court Judges Association in its 1974 study pointed out that where precise statistics are unavailable, other sources of information must be employed: "[J]ust because adequate statistics are often lacking, the importance of 'grass

[54] "Federal Prosecution on Indian Reservations," p. v.
[55] *Department of Justice Task Force Report*, p. 46.
[56] William H. Webster, testimony, *Hearing Before the U.S. Commission on Civil Rights, Washington, D.C.*, May 14, 1979, p. 9 (hereafter cited as *Washington, D.C., Hearing*).
[57] William H. Webster, Director, Federal Bureau of Investigation, attachment II to letter to Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, Aug. 7, 1979, in exhibits to Washington, D.C., hearing.

roots' information concerning the operation of the criminal justice system is magnified."[58] In fact, substantial information is available from those persons most directly involved with the administration of justice on Indian reservations—the prosecutors, police, and the Indian people who are the consumers—as well as from Federal officials within the Department of Justice and the Department of Interior.

Investigation

The FBI, as noted previously, has primary investigative responsibility for offenses falling under the Major Crimes Act[59] by virtue of general practice over the past 30 years, despite the fact that it is not required by Federal statute to assume this responsibility. The critical role played by the FBI, and the systemic difficulties caused in practice, was pointed out by the American Indian Policy Review Commission:

> Investigation by FBI agents is the primary basis for U.S. attorney prosecutions. Highly trained officers can make the work of a prosecutor much easier, and consistent association develops identifiable working patterns. But FBI agents are not usually close to Indian communities, either physically or culturally, and cannot easily grasp the equities of a situation which so often have much to do with the decision to prosecute or decline. Since local BIA special officers, police or tribal police are much closer, FBI agents are not often the first officers on the scene of a crime. Thus, the scene often has to be preserved until an agent can arrive, in which case they usually end up redoing work already done by a more closely situated BIA or tribal officer. The quality of investigation may ultimately turn on the work done by local officers in any event, pointing up the desirability of having well-trained locals for this, as well as all the other more obvious reasons.[60]

Delay and Duplication

The Department of Justice Task Force concluded, after its nationwide review of the various participants in Federal law enforcement in Indian country, that the FBI's role in the investigation of most major crimes was at best duplicative of the investigation already performed by a BIA or tribal investigator. In fact, the FBI's involvement, the Task Force found, was often an impediment to effective and speedy law enforcement because "duplication only serves to lengthen the time, often by days, between the occurrence of a criminal act and prosecutive action."[61]

The Task Force noted that the response time of FBI agents to a major crimes complaint may vary from "several hours to several days later, depending upon the seriousness of the crime and the press of business."[62] The less serious felonies, such as aggravated assaults, are not treated as a priority by the FBI and thus may result in a greater delay in response time. The Task Force observed that "often there is a significant difference in the mobilization of criminal justice resources when the victim of a reservation crime is a non-Indian" than when both offender and victim are Indians.[63]

The practice of most United States attorneys of accepting only cases referred by the FBI was condemned by the Task Force as wasteful and counterproductive to effective law enforcement. Although recognizing the severe problems of the BIA in providing adequate police services to Indian reservations, the Task Force found that "its criminal investigative capacity is not inferior to that of other agencies which the Department, through the U.S. attorneys, deals with regularly."[64]

Based on its findings, the Task Force recommended that the FBI assume a supportive rather than primary role in the investigation of major crimes occurring on Indian reservations and that United States attorneys accept referrals for prosecution directly from BIA criminal investigators and, specifically, that the Department of Justice should:

> Direct the FBI to confine its investigative activities to those reservation cases requiring their special expertise or cross-jurisdiction capability or those investigations requested by the BIA or U.S. Attorney; and to assist the BIA special officers in assuming the responsibility of direct presentment of cases to the U.S. Attorney; and
>
> Direct the U.S. Attorneys to begin accepting investigative reports directly from BIA special officers and to work with the BIA as it would any other federal investigative agency both in the field and at the headquarters level.[65]

[58] "Federal Prosecution on Indian Reservations," p. v.
[59] 18 U.S.C. §1153 (1976).
[60] *Task Force Four Report*, p. 38.
[61] *Department of Justice Task Force Report*, p. 36.
[62] Ibid., pp. 42–43.
[63] Ibid., p. 43, n. 45.
[64] Ibid., p. 36.
[65] Ibid., p. 39.

The recommendations of the Department of Justice Task Force were never implemented, and the Task Force itself ceased to exist when a new administration and a new Attorney General took office in 1976. It appears, however, that the inadequacies identified in 1975 in procedures for investigating major crimes on Indian reservations still exist, and a wide range of individuals close to law enforcement in Indian country find valid today the recommendation that the FBI should be removed from its role as the primary investigative agency for major crimes in Indian country.

Availability of FBI Resources

A highly significant factor affecting the adequacy of the FBI's performance on Indian reservations is the availability and allocation of FBI resources to this classification of assignments. On a national level, the Department of Justice sets priorities for allocation of investigative and prosecutorial resources based on an evaluation of the kinds of criminal activity that have the greatest effect on society. At the present time, investigations of organized crime, white-collar crime, and national security violations are at the top level of priority, and, according to the Director of the FBI, "those being the areas of primary impact, we try to devote an increasing number of our resources to them on an on-going programmatic basis."[66] Investigation of crimes on Indian reservations is set at the lowest priority level.

United States attorneys whose districts include Indian reservations feel the effect of the national priorities in terms of inadequate FBI resources to serve the reservations. The United States attorney for Montana stated:

> The big problem we find with the FBI is the priorities nationally of the FBI don't include priorities for law enforcement on Indian reservations. The priorities set by the administration and the FBI are white-collar, organized crime, racketeering, and national security. And we find a problem with numbers of FBI agents to service the reservations. I don't know what the answer to that is other than an adjustment of FBI and administration priority because we're not able to accomplish that by ourselves.[67]

At the same time that national priorities for investigation of Federal offenses were established, the United States attorney for Arizona wrote to the Director of the FBI requesting that investigations of crimes on Indian reservations receive top priority in those Federal districts containing Indian reservations, since there is no effective alternative to Federal prosecution of major crimes.[68] The Director of the FBI declined the request based on a perception that crimes on Indian reservations do not have sufficient effect on society in general to justify increasing their priority and therefore allocation of resources:

> No, it was not done, and that would have included the whole range of personal crimes. It was not done simply because it was inconsistent with our effort to identify those types of offenses which have the greatest impact on our society.[69]

At the same time, the total amount of FBI resources on a national level is being decreased. The Director of the FBI explained:

> [W]e're trying to operate on an increasingly demanding jurisdictional level with static and in fact diminishing resources. Between 1976 and the end of 1980, we will have lost over 1,000 special agents by budgetary attrition.[70]

On an operational level, the reduction in resources cannot help but cause a reduction in the availability of FBI investigative services on Indian reservations. The special agent in charge of the Minneapolis Area Office of the FBI, which includes Indian reservations in North Dakota, South Dakota, and Minnesota, explained that the reduction in the number of agents will necessarily cause a decrease in the amount of time FBI agents can respond to offenses committed on the Indian reservations within his area:

> There are only so many of us. We cannot, we don't have a response factor of minutes, of half-hours, or 45 minutes. Many times within the

[66] Webster Testimony, *Washington, D.C., Hearing*, vol. II, p. 15.
[67] Robert T. O'Leary, testimony, *Washington, D.C., Hearing*, vol. I, p. 160.
[68] Michael D. Hawkins, United States attorney for the District of Arizona, letter to the U.S. Commission on Civil Rights, Apr. 11, 1979 (Commission files).
[69] Webster Testimony, *Washington, D.C., Hearing*, vol. II, p. 16. Mr. Hawkins' expression of views had some effect, however. The FBI had an emergency need for 100 agents to be used for foreign counterintelligence and proposed to draw six special agents from the Phoenix Division for this assignment. According to Director Webster, "When we got down to Phoenix, the protest there was that they needed these six agents we were going to take from Phoenix to work the Indian reservations and we left them." Nonetheless, the priority system was not changed and no additional investigative resources were allocated for work on Indian reservations. Ibid.
[70] Ibid., p. 8.

past years, we would say we have men who could respond within 1 hour of where a crime was committed. However, with a reduction of monies and cuts in our budgets. . .we have found that we are going to have slower response time in many areas of work where before we were able to respond immediately.[71]

FBI Credibility in the Indian Community

Particularly from the South Dakota Indian reservations, a number of complaints have arisen regarding the conduct of FBI agents. Many individuals believe the mission of the FBI is to suppress dissent and radical political activity on the part of Indian people, rather than to act as an impartial investigative agency. An example of this attitude toward the FBI was expressed by a resident of the Pine Ridge Reservation, who is active in the American Indian Movement (AIM):

> My personal view of the Federal Bureau of Investigation is, on the reservation, on the part of the reservation where I live in Porcupine, I look at the FBI as snakes. That is my personal view. . . .
>
> As a member of the American Indian Movement, we have had people—members of the American Indian Movement have been murdered, and because they are AIM people, the FBI does little or a show of an investigation towards the people that committed the murder, but there is never any convictions made, or only a few. There are deaths that are unsolved on the reservation because of different people that are known members of the American Indian Movement, but if an AIM member is alleged to have committed a crime against somebody or whatever, the FBI will go out and just break itself trying to convict an Indian person, especially if you have long hair in South Dakota.[72]

The Department of Justice Task Force on Indian Matters in its 1975 report noted the same kind of resentment arising from varying FBI response, apparently depending on the identity of the victim:

> Aggravated assaults are so common on Indian reservations that they do not receive very high priority attention. Indians often complain that if a person sticks a knife into his neighbor in Peoria, Illinois, a major effort would be made to bring criminal justice sanctions to bear on the offender. They contend that a similar crime occurring in Pine Ridge, South Dakota, would go almost unnoticed. Indians feel that some federal prosecutors have the attitude that offenders and victims of reservation crimes are "just a bunch of Indians." This view is reinforced by the fact that often there is a significant difference in the mobilization of criminal justice resources when the victim of a reservation crime is a non-Indian. Perhaps the premier example of this disparity in treatment occurred recently on the Pine Ridge reservation, the scene of widespread violence and several dozen murders in the last year. Federal response to these crimes has been fairly routine. However, when two FBI agents were killed on the reservation, the FBI mobilized more than 175 agents complete with helicopters and armored personnel carriers. Yet when Indians complain about the lack of investigation and prosecution of reservation crimes they are usually told that the Federal government does not have sufficient resources to handle the work[73]

The lack of accurate statistics inhibits a meaningful assessment of the complaint of disparate treatment by the FBI. The FBI, moreover, does not employ a system of handling complaints about the conduct of its agents that permits public accountability.

If an Indian, or for that matter any person, has a complaint about the conduct of an FBI agent, the allegations are investigated either in the field office of by the Office of Professional Responsibility in FBI headquarters. Within the Office of Professional Responsibility, any personnel action deemed appropriate is put into effect. However, as explained by the special agent in charge of the Minneapolis Area Office of the FBI, the complainant is not notified of the disposition of his or her complaint:

> COUNSEL. Are the results of the complaints made known to the complainants?
>
> MR. BRUMBLE. I do not believe so. I have never notified a complainant of the results of one.
>
> COUNSEL. I want to get that very clear. If someone, let us say, in the tensions of the past 5 to 10 years out here, made a complaint about a specific FBI officer, misconduct or alleged misconduct or whatever, that officer could have been perhaps fired, transferred, demoted? Is that accurate? And that individual who made the complaint and the rest of the community

[71] David Brumble, testimony, *South Dakota Hearing*, p. 208.
[72] Lorelei Means, testimony, ibid., pp. 109–10.
[73] *Department of Justice Task Force Report*, pp. 42–43, n. 45.

would never know whether any action was taken one way or the other?

MR. BRUMBLE. That is right.[74]

Thus, by its policies for handling complaints, the FBI does nothing to dispel any false impressions within the Indian community of FBI misconduct or to assure the community that appropriate corrective action has, in fact, been taken when misconduct is found.

Cultural Barriers and FBI Impartiality

Several United States attorneys have expressed the opinion that the impartiality of the FBI compared to the BIA or tribal police is a major factor in their preference for the FBI's maintaining a substantial role in the investigation of major crimes. David Vrooman, United States attorney for South Dakota, stated:

> I do not believe the Indian tribes have yet recognized the separation of power. As long as the executive is calling the shots, I think it is going to be dangerous to have all crimes investigated on the reservation where, when you have an election, people's jobs are at stake. The FBI, I think at this point, goes in, does not have any local pressure insofar as their investigative techniques are concerned.[75]

In a similar view, Robert O'Leary, United States attorney for Montana, stated:

> I believe. . .that the Indian tribes and the residents on the reservations do have confidence in the FBI and the FBI investigations, and the independence of the FBI. . .which is not colored in any way by any connection with the operation or the overall administration of the Indian reservations.[76]

In offenses involving Indian participants or witnesses from different tribes, for example, Navajos and Hopis, the FBI is said to be the only investigative agency viewed as impartial and therefore having credibility within the Indian community.[77]

The generalized expertise of FBI agents and the quality of their investigations, however, must be viewed in light of their knowledge of and familiarity with Indian reservations and Indian culture. The basic training provided to FBI agents at the FBI Academy does not include any specialized training in Indian law and culture.[78] FBI agents newly assigned to agencies with investigative responsibilities in Indian country may receive some on-the-job orientation from their colleagues on an ad hoc basis,[79] but there is no coordinated system on a national basis to see that this orientation is provided. Moreover, FBI agents are not stationed on Indian reservations and thus are outsiders.

Some FBI officials express the view that the FBI's professional investigative expertise transcends any cultural differences. The head of the FBI's Minneapolis Division stated:

> Our agents are not specially trained to work on reservations because we do not feel as investigators that there is any difference in investigating a crime on the reservation, necessarily, than any other type of federal crime.[80]

It is the strongly held view, however, of tribal and BIA criminal investigators that the FBI is handicapped in its investigative abilities by reservation residents regarding them as outsiders. Henry Gayton, BIA special officer for the Standing Rock Sioux Reservation, stated: "We have had instances. . .where people of the community have wanted to talk to one of us rather than somebody that is not living there."[81]

A tribal criminal investigator from the Pine Ridge Reservation had a similar observation:

> People are a lot more open to you if they know you. If you are going to go in a community and nobody's seen you before and you come from 40 miles away, they are going to look you over for about 2 days before they are going to start talking to you.[82]

Fred Two Bulls, captain of the Oglala Sioux Tribal Police of the Pine Ridge Reservation, concurred, pointing out the advantages of the bilingual ability of his investigators on a reservation where many residents speak the native language:

> There [are] many times when this happens [that reservation residents will not talk to the FBI].

[74] Brumble Testimony, *South Dakota Hearing*, p. 207. See also Webster Testimony, *Washington, D.C., Hearing*, vol. I, pp. 6–7.
[75] David Vrooman, testimony, *South Dakota Hearing*, p. 196.
[76] O'Leary Testimony, *Washington, D.C., Hearing*, vol. I, p. 155.
[77] Leon Gaskill, special agent in charge, Phoenix Office, FBI, interview, Apr. 9, 1979.
[78] Brumble Testimony, *South Dakota Hearing*, p. 195.
[79] Gaskill Interview.
[80] Brumble Testimony, *South Dakota Hearing*, p. 193.
[81] Henry Gayton, testimony, ibid. p. 174.
[82] Lee H. Antelope, testimony, ibid. p. 123.

> The people just would not communicate with someone that isn't from there. It helps a lot to be bilingual in this line of duty on the reservation to some of the people. They do speak English but not to a point where they can really express themselves or make you understand what they really want. In their own language they feel more comfortable.[83]

Tribal Autonomy

An inevitable result of the requirement that FBI agents must present major crime cases to the U.S. attorney for a decision whether or not to prosecute is seen as a loss of tribal control over the handling of serious offenses that threatens the reservation community. The lack of control can affect reservation tranquility and security and the credibility of the tribal government. As the governor of the Gila River Community pointed out:

> We're getting quite a bit of concerned calls, in other words, we're getting some pressure from our community members.
>
> The only thing that we would do is to say that we don't—we, the tribal government, at least in the executive body doesn't have anything to do with investigation of these cases, and it's to them it's kind of like a cop-out.
>
> But the working relationship, I think, between the tribe, the Bureau (BIA), and the FBI are not that good, at this point.[84]

Tribal investigators have expressed their desire to assume responsibility for the investigation of major crimes as a way of increasing their standing and prestige within the Indian community they serve. Asked if this was his goal, the captain of the Oglala Sioux Tribal Police replied:

> Yes, that is what we are striving to do right now, make it this way. In taking over the investigation, we'd feel more professional. Like what we are doing now, we feel like we are just a figurehead between the crime and the FBI there, that at times we don't get any credit for what we have done in some of the investigations.[85]

Asked how he thought it would affect the residents of the reservation if his department took over primary investigative authority, he replied:

> Well, I imagine it would be some that would disagree with it, some will like it. . . .I think they would give us a second look. They know that we are investigating and we mean business. This would give us more prestige.[86]

A lieutenant from the Oglala Sioux Tribal Police expressed his opinion about being the primary investigator presenting a case to the United States attorney without the involvement of the FBI: "Every time you have a middleman involved somewhere you are not getting the credit sometimes that you really want."[87]

A related consideration is the widely held perception within the Indian community that FBI agents, who are not part of the reservation community and do not have a personal stake in the maintenance of law and order there, do not always make a strong presentation to the United States attorney for the prosecution of cases. The American Indian Court Judges Association, in its survey, reported hearing such accusations:

> In our field trips, interviews and informal conversations, we have heard accusations against the F.B.I. which we cannot substantiate. These remarks have all been oral and have not been put in writing by any of the persons who have made them. Whether they are true or not, they are important because the people who related them believe them to be true. The main complaint is that the F.B.I. doesn't truly care about cases arising from Indian reservations. These individuals contend that since there is no glory in, or publicity for, such cases, the F.B.I. is interested only in cases involving kidnapping, drug rings, organized crime, etc. As a result, they declare, the F.B.I. doesn't pay much attention to the ordinary cases arising on Indian reservations.[88]

An area special officer for the BIA expressed a similar view that FBI agents are often less than positive when they present cases to the United States attorney, resulting in a denial of prosecution.[89] At any rate, the shielding of the United States attorney from direct contact with tribal or BIA investigative officers means a denial of tribal participation in decisions that profoundly affect law enforcement and thereby the quality of reservation life.

[83] Fred Two Bulls, testimony, ibid. p. 174.
[84] Quoted in *Task Force Four Report*, p. 38.
[85] Two Bulls Testimony, *South Dakota Hearing*, p. 174.
[86] Ibid., pp. 174–75.
[87] Antelope Testimony, ibid, p. 123.
[88] "Federal Prosecution on Indian Reservations," pp. 32–33.
[89] Eugene Trottier, interview, June 7, 1978.

What is at stake is a critical element of Indian self-determination.

Prosecution

The prosecution of Federal offenses in Indian country is almost exclusively handled by the United States attorneys of the various Federal districts in which Indian reservations are located. Although they are responsible for prosecuting offenses falling under the Major Crimes Act, the General Crimes Act, and other Federal statutes, there is no requirement that they prosecute every case that is presented to them. Each United States attorney possesses wide discretion in the cases he or she accepts or declines for prosecution.

Geographical and Cultural Barriers

The jurisdictional framework that has developed for Federal prosecution of the most serious offenses committed on Indian reservations produces tremendous logistical and cultural problems. In its review, the Task Force on Indian Matters of the Department of Justice noted the law enforcement difficulties caused by the rural isolation of most Indian communities:

> Indian reservations encompass enormous geographic areas where the population is sparse and scattered rather than conveniently gathered in cities or towns. The Navajo reservation, for instance, spreads into four states containing roughly 16 million acres in total area and 136,000 people. More common, however, are reservations of 1 to 2 million acres supporting a population of 500 to 2,000 people. It is not uncommon for several hours to elapse between the time a crime is committed and the time a law enforcement officer arrives at the scene by car. Providing effective law enforcement services under these circumstances is very difficult.[90]

In its 1974 study of Federal prosecution of crimes on Indian reservations, the American Indian Court Judges Association noted that the difficulties of law enforcement on rural reservation areas are compounded by the fact the the Federal courts and Federal prosecutors are located in major cities often remote from Indian communities. The geographical separation leads to a cultural separation and, in the view of the association, a tendency on the part of Federal prosecutors to minimize the importance of Indian cases:

> The remoteness of the United States Attorney's offices from the Indian reservations causes the importance of cases occurring on those reservations to seem less important than, in fact, they are. These cases are generally not publicized in the major cities and do not appear to be matters of great urgency or public concern. In addition, the great distances involved often mean that the United States Attorney and his staff are generally unaware of the cultures of varying Indian communities. They tend to impute the culture of one tribe to other tribes. Thus, they cannot fully grasp the problems of law enforcement on any specific reservation. Furthermore, they learn little of progress and change on the reservations, nor do they know of the moods and attitudes of the reservation's residents.[91]

The Department of Justice Task Force recognized in its report the prevalent feeling among Indian people that the Federal Government does not consider Indian cases important enough to devote sufficient prosecutorial resources:

> Citizen lack of confidence in the reservation law enforcement system is widespread. Residents of several reservations believe there has been a complete breakdown of law and order. They are cynical about the willingness and ability of the [Federal] government to protect persons and property. In many cases, no effort is made to report crime because of the feeling that nothing would be done. Self-help is common among both Indians and non-Indians. . . .
>
> Far more widespread and serious than concern about response time is the belief among Indians that the Federal Government simply declines to prosecute Indian cases because it is unwilling to devote federal prosecutive resources to anything but the most unusually serious offenses.[92]

Declinations of Prosecution

The high rate of declination of prosecution of major crimes offenses by United States attorneys has been a source of dissatisfaction in the Indian community for some time. Precise statistics are not maintained by Federal law enforcement agencies, but it appears that in excess of 80 percent of major crimes cases, on the average, presented to United States attorneys are declined for prosecution.[93] Offenses

[90] *Department of Justice Task Force Report*, p. 24.
[91] "Federal Prosecution on Indian Reservations," pp. 33–34.
[92] *Department of Justice Task Force Report*, pp. 23–45.
[93] *South Dakota Hearing*, p. 186.

covered by the Major Crimes Act are serious felony offenses. Ordinarily, there is no alternative to Federal prosecution other than referral for prosecution within the tribal system, where the 6-month limitation on sentences that can be imposed is often an inadequate sanction for the seriousness of the offense.

The Department of Justice Task Force on Indian Matters examined the excessively high rate of declinations by United States attorneys and came to the conclusion that the exercise of prosecutorial discretion did not appear to be deliberately discriminatory, but it was nevertheless unsatisfactory in terms of the Federal responsibility:

> It is our conclusion that U.S. Attorneys treat Indian country cases in the same manner as they treat other types of criminal cases. It is also our conclusion that to treat these cases in the same manner as other federal cases overlooks the role of state/local prosecutor which, in addition to being the federal prosecutor, the federal government through the U.S. Attorney must play.[94]

There is no question that Federal prosecution of cases arising in Indian country presents unique difficulties. The geographical separation of Federal prosecutors and courts from reservation areas creates logistical difficulties in terms of transportation of defendants and witnesses for court appearances. The large percentage of alcohol-related offenses often presents impediments to successful prosecution because of the unreliability of the perception and memory of witnesses. Language and cultural barriers may cause reservation residents to seek to avoid having anything to do with a case in Federal court. The Department of Justice Task Force found that all these factors affected the exercise of prosecutorial discretion by United States attorneys in the face of competing priorities:

> U.S. Attorneys are committed to bringing cases they can win. Regardless of the seriousness of the offense, Indian cases present a range of problems any one of which often defeats a successful prosecution. Against these odds, it is difficult for a U.S. Attorney to justify great expenditures of time given the competing demands on his resources. . . .
>
> [W]hat we face in the prosecution of crimes occurring in Indian country is a fundamental difference in goals and objectives on the part of the managers of the federal system, the prosecutors, and the consumers of that system, the Indians. The managers are faced with heavy competing demands against which they must weigh Indian cases. As a general rule they prosecute cases in which the government has a good chance to win. Indian cases by their very nature are extremely difficult to win and are atypical of the kinds of cases usually brought in federal court.[95]

However, as noted earlier, it was the Federal Government, and not the Indian tribes, that took the initiative to assume Federal jurisdiction over serious felony offenses in Indian country and to deprive tribes of the authority to exact meaningful sanctions. Thus, the Federal Government should bear the burden of providing adequate resources for an adequate prosecutorial effort:

> [O]ne cannot help but be concerned over the application of these factors [affecting the decision to decline prosecution] to cases arising from Indian reservations. The Indian people did not ask the Federal Government to assume the duties of prosecuting major crimes. This task was assumed voluntarily by the government and the government should bear the burden of all accompanying costs.[96]

The American Indian Court Judges Association recognized the difficulties in prosecuting violent crimes in which abuse of alcohol is a contributing circumstance, but condemned the effect on the exercise of prosecutorial discretion:

> In declining these types of cases, the prosecutor too often allows the real needs of the Indian community to fall victim to his own beliefs about what will be viewed as moral, acceptable or excusable behavior.
>
> It is estimated that over 50 percent of the federal cases arising from violations committed on Indian reservations involve alcoholic intoxication. . . .Though this sort of behavior may occur often or regularly on reservations, it is not, in fact, acceptable. Failure to prosecute in such cases could be interpreted as approving of anti-social behavior and, in effect, as licensing such activity.[97]

In addition to the encouragement of antisocial behavior, failure to prosecute a crime engenders

[94] *Department of Justice Task Force Report*, p. 45.
[95] Ibid., p. 48.
[96] "Federal Prosecution on Indian Reservations," p. 43.
[97] Ibid., pp. 38–39.

communal anger and a breakdown of the social structure when "reservation residents see an individual set free without having been punished for his crime."[98]

A more profound effect on the Indian community is the shattering of trust in the good faith of the Federal Government, which has assumed the responsibility of law enforcement in regard to serious offenses without effectively fulfilling its responsibility. The Chief of Law Enforcement Services of the Bureau of Indian Affairs described the effect on Indian communities of the breakdown of law and order caused by failure to prosecute serious offenses:

> They [felony offenses under the Major Crimes Act] are serious offenses. And whether alcohol, which is one of the biggest problems on reservations, is a good basis for prosecution or not, a number of United States attorneys will not prosecute if alcohol is involved. . . .
>
> The fact remains that the Indian community looks to the Federal Government for the prosecution of serious offenses, and when it's not happening, you have, again, this negative impact in the eyes of the Indian community as to the role of the Federal Government in Indian country. That's where the whole problem starts. The mistrust begins at that level, and when you begin to mistrust the police and the criminal justice system, all the other little sections of the wall begin to crumble.[99]

Possible Directions for Change

The serious problems for law enforcement in Indian country are to some degree a product of neglect. It appears that where participants in the system are open to change, possibilities for improvement exist. An examination of some innovative programs recently put into effect in the State of Arizona and on the Pine Ridge Reservation of South Dakota demonstrates that a more positive Federal role in law enforcement can be achieved.

The broad discretion vested in the United States attorneys in the various Federal districts permits the initiation of innovative programs on a local level. It is instructive to examine, therefore, the comprehensive evaluation and modification of existing practices undertaken by one United States attorney in the investigation and prosecution of Federal cases in Indian country.

The State of Arizona contains 17 Indian reservations of varying sizes and characters. The Navajo Nation is the largest and most populous, with more than 150,000 members occupying a reservation of 9 million acres located within 3 States.[100]

Michael Hawkins became United States attorney for the District of Arizona in February 1977. In looking at Federal investigation and prosecution of major crimes on Indian reservations in Arizona, he noted the same duplication of investigative efforts that had been condemned in 1975 by the now-defunct Department of Justice Task Force on Indian Matters:

> [T]he single most dramatic thing. . .I saw [upon taking office as United States attorney] was significant duplication and overlap of the law enforcement services being offered either by tribal police agencies, the Bureau of Indian Affairs Law Enforcement Services, and the FBI. I found instances, for example, where three separate reports were being prepared by three separate agencies, witnesses being interviewed three and four times by different agencies—no sense, no standards, no guidelines as to the referral of those reports, nothing beyond informal understandings between individuals about investigative jurisdictions between the agencies. I felt a compelling need, at least on my part, to deal with that situation.[101]

Mr. Hawkins perceived the effect of the duplication of investigations to be detrimental to effective law enforcement, as well as wasteful:

> Beyond the cost to taxpayers of such duplication of responsibility, this overlap posed significant practical problems for federal law enforcement. Witnesses to crimes were often interviewed by two or three separate agencies, sometimes producing such inherently conflicting statements that subsequent criminal prosecutions were rendered enormously difficult, if not impossible.[102]

To develop a more effective law enforcement program in Arizona, Mr. Hawkins initiated discussions with tribal and law enforcement officials of the Navajo Nation:

[98] Ibid., p. 43.
[99] Eugene Suarez, testimony, *Washington, D.C., Hearing*, vol. I, p. 131.
[100] Arizona, New Mexico, and Utah.
[101] Michael D. Hawkins, testimony, *Washington, D.C., Hearing*, vol. I, pp. 148–49.
[102] Michael D. Hawkins, statement to the United States Commission on Civil Rights, Mar. 20, 1979, p. 5.

> We began with the Navajo Nation, America's largest tribe, which has a fairly sophisticated tribal government and its own very independent well-trained police force, its own independent judiciary, and they have a real willingness to deal with the problem. So we began there and then moved on to the other Indian nations. . . .
>
> The Navajo guidelines were drafted after a series of meetings. . .with representatives of the tribal police and Bureau of Indian Affairs officers and the FBI and myself.[103]

As a result of these meetings, guidelines were issued on a 120-day trial basis within the Arizona portion of the Navajo Nation. The guidelines set forth: (1) the types of Federal offenses that would be routinely declined for prosecution by the United States attorney and thus could be investigated and prosecuted within the tribal system; and (2) the division of investigative responsibilities for Federal offenses among the tribal police, the BIA, and the FBI.[104] Following the 120-day trial period, Mr. Hawkins met again with officials from the Navajo Nation, the BIA, and the FBI and, with minor adjustments, issued final guidelines for the investigation and prosecution of Federal offenses occurring within the Navajo Nation. The United States attorneys for Utah and Arizona agreed to apply the guidelines to those portions of the Navajo Nation lying within those States, and there are now uniform standards for Federal offenses within the Navajo Nation, despite the fact that it lies within three States.

After a year's experience with the guidelines, Mr. Hawkins met with most leaders of the remaining Indian nations in Arizona, who, for the most part, wished to have the guidelines put into effect on their reservations. With minor alterations, the guidelines are now in effect in virtually all the Indian nations in Arizona.[105]

The use of the guidelines first within the Navajo Nation and then in other Indian nations in Arizona has ended the former duplication of investigative efforts by tribal, BIA, and FBI investigators, according to Mr. Hawkins:

> [W]e now have direct reporting. . .by tribal agencies, the BIA, and the FBI. There's no overlap in the reports; single investigations are done; single interviews of witnesses to crimes are done.[106]

The greater involvement of tribal officers, Mr. Hawkins said, has also improved the quality of Federal law enforcement by diminishing cultural barriers between the Anglo justice system and Indian participants within it.

> It [use of the guidelines] has enhanced significantly the direct relationship between tribal police officers and our own officers. They are now more intimately involved in what we do. They participate in grand jury proceedings, and they are a tremendous help and benefit to overcome language and cultural and experience barriers that may exist between Anglo prosecutors and crimes which involve inhabitants or members of various Indian nations.[107]

Officials of the Federal Bureau of Investigation in Phoenix participated in the development of the guidelines and concur with the United States attorney that the implementation has been positive. The special agent in charge of the Phoenix Division of the FBI said the guidelines have provided a more effective use of its investigative resources, since the FBI is no longer required to investigate those types of cases that would be routinely declined for Federal prosecution. With the reduction of the number of FBI agents on a national level and other priorities that demand resources, the FBI official said, it is necessary to encourage greater involvement of tribal police and the Bureau of Indian Affairs in the

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[103] Hawkins Testimony, *Washington, D.C., Hearing*, vol. I, p. 149.

[104] In summary, the guidelines provide as follows:
Absent aggravating circumstances, the following types of offenses will be routinely declined for prosecution by the United States Attorney, and thus may be investigated by the tribal police and prosecuted within tribal court: alcohol violations, theft offenses involving less than $2,000 in property loss, and assault, except upon a Federal officer, not resulting in serious bodily harm.
The following types of offense may be investigated by Bureau of Indian Affairs investigators for presentation directly to the United States attorney: rape, carnal knowledge, incest, theft offenses with property loss in excess of $2,000, public assistance violations involving less than $1,000, and arson not resulting in death or serious bodily harm.
The following types of offenses will be the primary responsibility of the FBI for investigation and presentation to the United States attorney for prosecution: murder, manslaughter, assault on a Federal officer resulting in serious bodily injury, arson where death or serious bodily harm results, bank or other armed robbery, embezzlement, kidnapping, and public assistance violations involving more than $1,000 loss.
The guidelines further provide that in all cases where the United States attorney declines prosecution, the report of the investigation shall be returned to the originating agency for reference to tribal officials for processing in tribal court.
The complete text of the guidelines is attached to the Statement of Michael D. Hawkins, in exhibits, *Washington, D.C., Hearing*, vol. II.

[105] *Washington, D.C., Hearing*, vol. I, p. 149.

[106] Ibid.

[107] Ibid., p. 150.

investigation of Federal offenses in Indian country.[108]

Representatives of the Navajo Nation have also been pleased with the implementation of the guidelines. Closer working relations have developed between the Navajo Police Department and the FBI, with the clarification of investigative responsibilities. The chief of law enforcement services of the Navajo Nation said the tribal police will soon be capable of more extensive investigative responsibilities, with the eventual goal of assuming primary responsibility for the investigation of major crimes, with the FBI playing a supportive role.[109]

One goal of the United States attorney in promulgating the guidelines was to expand tribal investigative and prosecutorial responsibilities in order to put the Federal law enforcement effort more in accord with the policy of Indian self-determination. At the time the guidelines were first put in effect, Mr. Hawkins set this goal:

> This expansion of responsibility for Navajo Tribal Police officials is in the spirit of self-determination. We look forward to the day when the Tribal Police will have primary responsibility for all criminal violations occurring within the Indian Nation, with federal agencies providing such scientific and other support as may be necessary.[110]

In his view, Mr. Hawkins said, the increased responsibilities given to the tribal police by the guidelines and the greater contact with Federal prosecutors has improved their investigative capabilities:

> As to those Indian nations with larger tribal police forces, we have found a significant improvement in the communication between officers of those agencies and our own office. Since those officers now have direct contact with our prosecutors, they have a greater understanding of federal procedural and evidentiary requirements, and we have seen a resultant improvement in the efficiency of investigations conducted by them.[111]

Under the guidelines, the United States attorney will accept referrals for prosecution for some types of cases directly from tribal and BIA investigators. The greater responsibilities given to tribal and BIA police have had another positive effect:

> [W]e found that the report-writing abilities of tribal police officers and BIA law enforcement specialists have improved as a result. That's not to say that there weren't problems initially, and particularly when you're dealing with the language barrier and terminology barrier. But it increased their proficiency in the report-writing immensely. And I think both sides have benefited from it.[112]

In sum, the experience in the District of Arizona demonstrates that increased responsibility given to tribal and BIA police increases their ability to assume an even greater role in Federal law enforcement.

Other examples exist of increased communication and cooperation among tribal and Federal officials in regard to law enforcement on Indian reservations. According to the United States attorney for Montana, the quality of law enforcement on Indian reservations in that State has improved since the 1960s because of the "development. . .of more adequately trained Indian and tribal law enforcement officers and. . .better cooperation with the FBI in the delivery of law enforcement to the Indian reservations."[113] He has systematically brought tribal investigators into the prosecution of major crimes cases, both to develop their capabilities and to improve communication among tribal and Federal authorities:

> With respect to the tribal police, in three of the reservations we have made every effort to encourage the tribal police forces to submit their written reports to us on any case that has been accepted for prosecution, to bring the tribal officers to the grand jury, make them a part of the full prosecution system, because I feel it makes a better operation for them as tribal policemen as far as participating in the system from the beginning to the end. And it also encourages cooperation between the FBI and the tribal policemen who, frankly, get together at grand jury, get together with us. . .to discuss it with myself and my assistants, and we found it to be very helpful as far

[108] Leon M. Gaskill, special agent in charge, Phoenix Division, FBI, interview, Apr. 9, 1979.
[109] Larry Benally, acting commissioner of public safety, Navajo Police Department, interview, Dec. 15, 1979.
[110] Michael D. Hawkins, United States attorney for the District of Arizona, press release, Aug. 30, 1977 (Commission files).
[111] Hawkins Statement, *Washington, D.C., Hearing*, vol. II.
[112] Hawkins Testimony, *Washington, D.C., Hearing*, vol. I, p. 154.
[113] O'Leary Testimony, ibid., p. 151.

as the law enforcement on the three major reservations in Montana.[114]

Another example of a more constructive Federal role is found on the Pine Ridge Reservation in South Dakota,[115] both in terms of the development of an improved tribal law enforcement system and the initiation of better relations between the FBI and the Indian community. These developments are all the more remarkable in view of the recent, well-publicized, armed confrontations on the reservation and the almost complete deterioration of law and order.

Notable in the recent history of the Pine Ridge Reservation was the occupation of the village of Wounded Knee in 1973. The American Indian Movement (AIM) had come into existence in the late 1960s as a militant organization seeking to provoke change on behalf of Indians by public confrontations. Dick Wilson, then tribal chairman of Pine Ridge, was bitterly opposed to AIM's ideology and tactics and announced his intention to drive AIM off the reservation. On February 27, 1973, some 200 AIM members and Oglala Sioux seized the town of Wounded Knee, site of the massacre 84 years earlier, and declared their determination to stay and die. The Federal Government responded by surrounding Wounded Knee with 250 FBI agents, U.S. marshals, and BIA police equipped with armored personnel carriers, machine guns, and rifles.

The siege at Wounded Knee went on for 2-1/2 months, observed and reported by news media from all parts of the United States and several foreign countries. During the occupation, two Indians were killed and Indians and government agents alike received serious wounds from the thousands of rounds fired in the course of the standoff.

Following the occupation of Wounded Knee, a period of violence and conflict set in on the reservation as AIM and its sympathizers clashed with tribal officials, BIA police, and the FBI. A series of shootings and deaths followed as various factions contended for control of day-to-day affairs on the reservation. Many of these homicides remain unsolved.

A special commission was established in the spring of 1975 by the Secretary of the Interior to examine and report on the causes of the unrest on the Pine Ridge Reservation. A major contributing factor identified was the inadequacy of the tribal law enforcement system. The special commission found massive dissatisfaction among the tribal police officers themselves and in the Indian community they served. The special commission reported:

> The morale of the Department is very low due to improper grade structure, lack of leadership, poor uniforms and equipment, unqualified persons assigned to leadership positions and political pressures. . . .
>
> The relations between the Police Force and the public is very negative in all respects. Great dissatisfaction with the police was expressed in all meetings. The people related experiences with selective enforcement, harassment, intimidation, drunken officers, and general non-professional activities and abuses.[116]

The special commission concluded that: "The present patchwork police force could be characterized as an armed, only slightly controllable faction of the community rather than a coherent stabilizing force."[117]

Law enforcement problems at Pine Ridge were exacerbated by the shootout on June 26, 1975, at Oglala that resulted in the killing of an Indian man and two FBI agents who were attempting to execute an arrest warrant. Following the deaths, more than 100 heavily armed FBI agents, including a Special Weapons and Tactics (SWAT) team, combed the reservation looking for suspects. The Department of Justice Task Force on Indian Matters reported: "The number of FBI agents on the reservation has increased tensions and has resulted in numerous complaints of harassment, illegal searches, and general disruption of the Reservation."[118]

Following the Oglala killings, the number of FBI agents assigned to the Rapid City office, which serves the reservation, was greatly increased. As standard procedure, FBI agents would travel on the reservation in caravans of two to three vehicles,

[114] Ibid., p. 155.

[115] Pine Ridge Reservation, home of the Oglala Sioux Tribe, is located in southwest South Dakota in Bennett, Shannon, and Washabaugh Counties. Of the original 2.8 million acres provided under the 1889 treaty, approximately half remains in Indian ownership. Tribal headquarters are located in the village of Pine Ridge, where approximately 2,000 of the reservation's population of 12,000 Indians live. The remainder of the population is widely dispersed through the reservation in primarily rural areas.

[116] Report to the Secretary of the Interior from the Secretarial Commission on the Pine Ridge Indian Reservation, June 24, 1975, pp. 17–18.

[117] Ibid., p. 19.

[118] *Department of Justice Task Force Report*, p. 63.

armed with automatic weapons and occasionally escorted by a helicopter.[119] Although the upgrading of FBI personnel and weaponry was characterized by the FBI as a necessary security measure, the display of force served to intensify hostility against the FBI on the part of reservation residents.

Several factors over the past several years have brought a considerable measure of improvement in law enforcement on the Pine Ridge Reservation. Foremost has been a restructuring of the Oglala Sioux Tribal Police under a contract between the tribe and the Bureau of Indian Affairs, pursuant to the Indian Self-Determination Act.

Following a change in tribal administrations in 1977, the Oglala Sioux Tribe contracted with the Bureau of Indian Affairs to establish a tribal police system with a fundamentally different operational structure from the former BIA police system, which had received widespread criticism. Two key elements characterize the operation of the new Oglala Sioux Tribal Police: decentralization and community control. Under the previous BIA system, most police officers were stationed in the village of Pine Ridge, and their services were not readily accessible to residents in outlying and rural parts of the reservation. The lack of a law enforcement presence was a contributing factor to the earlier climate of violence and lawlessness.

Under the new system, officers are stationed in each of nine districts throughout the reservation. This decreases the response time when the police are summoned and places them in closer contact with the communities they serve. A lieutenant of the Oglala Sioux Tribal Police described the difference between the old and new systems:

> Well, I think there is more policemen over a bigger area in the communities. Each community, we just about know the people there and how they are going to react, and we are available. I mean, there is no such thing as having to wait for officers for 2 or 3 hours like you had before. We are divided into nine districts. . . .In the past, most of the police officers were stationed in Pine Ridge or in Kyle. And from Pine Ridge to Martin it took them at least 45 minutes to get there if they had a call. And we got our response time on a call down to about 7 minutes.
>
> [There are] small detachments all over the reservation for the community and for each district.[120]

A member of one of the outlying reservation communities described the improvement brought about by the availability of law enforcement services within the community:

> As compared to a few years back when the BIA had the law and order system, it is a lot better in that when the law and order was under the BIA, most of the policemen were stationed in Pine Ridge. That is about 50 miles away from Martin. Any time we needed the help of the law, we had to call over to Pine Ridge; sometimes it was 2 hours, 3 hours, and sometimes they never showed up. It was bad back then. It is a lot improved. . . .Because the police are right there, right in the community. They are right down the street when you need them.[121]

A corollary to the decentralization of the tribal police is a system of local community control of police personnel and activity. The Oglala Sioux Tribal Police are under the direction of a police commission, composed of commissioners elected from each of the nine local districts, which sets policy and oversees the operation of the law and order program. Each district also elects a district public safety review board that has the authority to hire, fire, and discipline the police personnel of its district. Police are thus stationed in each of the local districts and are responsible for their conduct to the elected review board in that district.[122]

A member of the American Indian Movement, residing in the Porcupine community of the Pine Ridge Reservation, praised the new police system that makes the officers accountable to the community:

> Now, the tribal police, we get along with them good at Porcupine. We have a community police review board. If there is any trouble, they have a way to view the complaint and the grievances and the people on the police force, we know them and get along very well.[123]

The police officials themselves have accepted and now are firmly in favor of the concept of community control. A lieutenant described his initial ambiva-

[119] Brumble Testimony, *South Dakota Hearing*, p. 193.
[120] Antelope Testimony, ibid., pp. 119–20.
[121] Alice Flye, testimony, ibid., p. 111.
[122] Gerald Clifford, interview, Apr. 6, 1978.
[123] Means Testimony, *South Dakota Hearing*, p. 111.

lence about control by a community review board and his later acceptance based on how the system was working in practice:

> When I first heard of this review board idea, I felt that policemen can't work for the board, that was my idea. And in about 2 months after I seen the operation and was part of it, I changed my idea. It can be done and it's working this [124]

No doubt a number of interrelated factors have contributed to the lessening of tension and violence on the Pine Ridge Reservation, but the improved law enforcement system must be seen as a major influence. The improvements in law enforcement would not have been possible without Federal funding.

At the same time, there has been marked improvement in relations between the Indian community on the Pine Ridge Reservation and the FBI. Many points of contention still exist, but there appears to be a basis for discussion and working out of differences. The FBI has established a working relationship with the new Oglala Sioux Tribal Police. Of primary importance is training provided by the FBI to tribal police officers, arranged through the FBI's Rapid City and Minneapolis Area Offices, to prepare tribal policemen to assume greater responsibility in the investigation of major crimes. The Director of the Minneapolis Area Office explained his purpose in making FBI resources available for training:

> I would like to see them be able to become a greater or have a greater role in it [investigating major crimes]. To this end, I am committed to as much training as I can possibly provide to both the BIA service officers as well as the tribal police. . . .we are trying to accommodate them by bringing the instructors here from Washington.[125]

In addition to formal class training, the FBI has been providing onsite instruction in investigative techniques, a practice one of the supervisors of the Oglala Sioux Tribal Police said he has found most useful:

> Well, they take the evidence that I collect and they take some of the photos or they go ahead and take the photos themselves and all the sketches that they make there. So far they have commented that we done a good job of getting all the evidence and all that stuff. It's making their job easier. . . .
>
> The things that we have missed are the things that they are teaching us when they go and do their investigation. The officers I have sent out with them. . .go right ahead and help them take the fingerprints and photographs. They are learning right along with them. That is, the new men I have on the force.[126]

Issues of conflict nevertheless persist between the FBI and the Oglala Sioux Tribal Police. Among them are the FBI's practice of coming onto the reservation without acknowledging an obligation to inform tribal authorities of their presence. Also at issue is the view of some tribal officials that some FBI agents assigned to the Pine Ridge Reservation since 1975 have a racist attitude toward Indians. Tribal officials and reservation residents also allege that there is an inadequate and discriminatory pattern of investigation of major crimes by the FBI. If the potential defendant is someone identified with former tribal president Dick Wilson, they say, the FBI is slow to act, but if the defendant is someone the FBI believes is a member of the American Indian Movement, the FBI moves zealously to investigate the case.[127]

A basis exists, however, for discussion of these matters of controversy. Meetings have been held among tribal police officials, the FBI, and the U.S. attorney to air differences and in some instances to work out solutions. For example, the U.S. attorney agreed to provide detailed information to tribal authorities about his reasons for declining to prosecute in major crimes cases. He has also established prosecutorial guidelines[128] that set forth in general terms the types of major cases that will be routinely declined for prosecution, thus affording tribal authorities the opportunity to place these types of cases more quickly within the tribal justice system. Both tribal officials and the FBI are firmly in favor of continuing the training programs provided by the FBI to tribal police.

The most significant development in the relations of the FBI to the Pine Ridge Reservation is a reduction by half of the number of agents assigned to the Rapid City office that serves the reservation.

[124] Antelope Testimony, ibid., p. 120.
[125] Brumble Testimony, ibid., p. 195.
[126] Ellsworth Brown, testimony, ibid., p. 122.
[127] Clifford Interview. Means Testimony, *South Dakota Hearing*, p. 110.
[128] *South Dakota Hearing*, exhibit 14, pp. 306–10.

Although the FBI still perceives a need for special security measures on certain portions of the Pine Ridge Reservation, the lessening of tensions and violence has occasioned a reexamination of the level of security and the number of personnel necessary to serve the reservation.[129] The decrease in the amount of force displayed by FBI agents on the reservation has apparently lessened the hostility toward them. A lieutenant of the Oglala Sioux Tribal Police described the change of attitude of community residents toward the FBI in his district:

> [The] population there in the community are a little bit leery of the FBI because the way they went and represented themselves before. . . .Well, before they usually come in there and they pack weapons and surround the house and all that stuff, and this is the image that they went and made for themselves. But so far now lately, well, we go over there and there is no weapons showing or anything like that, and even some of the agents are invited into the house and they do their interviewing right there. And the relationship between us and the special agents with the community is getting better. I think they are being accepted a little bit more. That isn't all the community, but, you know, it's the ones that they go visit—well, they are not afraid of the FBI anymore.[130]

The reduction of FBI personnel serving the Pine Ridge Reservation has resulted in an increased assumption of responsibility by the tribal police, a development welcomed by the tribe, the FBI, and the United States attorney. The Federal role on the reservation in this period has been to encourage and facilitate greater tribal participation in law enforcement and to take steps to reduce the level of hostility between the Indian community and the FBI. Although the animosity still persists to some degree, Pine Ridge is an encouraging example of the positive results that can be obtained by putting into practice the Federal policy of Indian self-determination.

The National Coordinating Role: A Vacuum

After completing its review, the Department of Justice Task Force on Indian Matters came to the conclusion that the Federal Government's law enforcement effort on Indian reservations was, in fact, contributing to the decline of law and order on Indian reservations:

> While a review of the available evidence demonstrates that there is no conscious or systematic discriminatory handling of Indian cases, it appears that current federal practices and standards applied in determining declinations in Indian cases have created a serious problem for the overall maintenance of law and order on reservations and have undermined the respect and confidence which the Indian people feel in the federal government's efforts to respond to the growing crime rate. Stated succinctly, Indian communities feel that the federal government is doing little or nothing to solve the crime problem. This fact alone should be of serious concern. At a minimum there has been a breakdown in communication between the Justice Department and Indian communities. At a maximum, the federal government is exacerbating the reservation crime problem and undermining Indian confidence in a system of laws by prosecuting so few offenders.[131]

The Task Force, in developing recommendations, recognized that the difficulties and inadequacies identified in the Federal law enforcement effort on Indian reservations do not admit to easy solutions but nevertheless could be addressed in a specific, coordinated manner. Federal responsibility for criminal prosecutions in the District of Columbia illustrates the kind of effort that would be required to improve the Federal performance on Indian reservations:

> The District of Columbia is also a federal enclave in which the Federal Government must play a state government role in the criminal justice area in a manner similar to that required of it with respect to Indian communities. The effort exerted in the 1960's to reform and revamp D.C.'s court system is an excellent example of the level of commitment required of the federal government in regard to the Indian criminal justice system. . . .
>
> Since the bulk of Indian reservations are located in less than ten federal districts, the problem is of manageable size.[132]

Foremost among recommendations of the Task Force was Federal assistance to improve tribal law enforcement and court systems, through a coordinated effort by the Bureau of Indian Affairs of the Department of the Interior and the Law Enforcement Assistance Administration of the Department

[129] Vrooman Testimony, ibid., p. 185.
[130] Brown Testimony, ibid., p. 122.
[131] *Department of Justice Task Force Report*, p. 49.
[132] Ibid., p. 51.

of Justice. The Task Force urged increasing funding for law enforcement and court programs and for training.

The Task Force also urged that greater use be made of the services of the Indian desk of LEAA to aid communication with the tribes and to provide their court and law enforcement systems with assistance:

> LEAA has a national Indian desk and personnel in several regional offices who grant and administer a multi-million dollar program of assistance to individual tribes and Indian organizations in the criminal justice area. LEAA has been a resource of major significance and influence. Its mission is extraordinarily well suited to meet the needs of Indian tribes and the most common points of contact with the Department for most Indians will have been through LEAA and its programs. LEAA has developed an excellent Indian program and positive contacts and communication with Indian people. It is a source of expertise which should be far more extensively utilized by other units of the Department.[133]

The Task Force recommended increased allocation of investigative and prosecutorial resources to Indian cases. It also recommended the adoption of a system for improved coordination of Indian matters within the Department of Justice. In regard to criminal matters, the Task Force recommended that the departmental coordinating function include the following components:

Establishing better communication and coordination among all elements of the federal criminal justice system and Indian tribes;

Working with FBI agents and FBI training personnel to develop a greater degree of specialized expertise on Indian law and reservation investigations among agents assigned to reservation areas;

Working with BIA and FBI investigators to ensure effective, thorough presentment of cases to U.S. attorneys;

Developing standards of prosecution for Indian cases which reflect the Department's role as State as well as Federal prosecutor;

Developing ways to gain greater cooperation from Indian people in the prosecution of cases including the assignment of a representative of the tribal government to work with the U.S. attorney's office in overcoming language and cultural barriers, and to keep the tribe advised of the status of cases;

Instituting methods for using the magistrate system more effectively so as to favor making arrests over seeking indictments and for diverting Federal misdemeanor cases to magistrate court for disposition.

Involving the Federal courts in the effort to make justice less remote to Indians by periodically sitting in areas near reservations and increasing the numbers of Indians on juries;

Reviewing and updating departmental directives for FBI intelligence-gathering activities on Indian reservations;

Assisting tribes in their codification of tribal law so as to create a coherent scheme of Federal tribal offenses; and

Assisting the Department in developing reasonable legal and legislative approaches to Indian jurisdiction and related issues.[134]

The Current Lack of Coordination

After the demise of the Task Force on Indian Matters, its recommendations in the area of criminal justice were not implemented. The problems continue to exist, as discussed in the preceding pages, and some have been exacerbated. Coordination of Indian criminal justice matters within the Department of Justice and with other Federal agencies has reverted to its former fragmented nature.

Oversight for the Department's criminal prosecution and investigations, including those in Indian country, is handled by the Deputy Attorney General. Key divisions under his direction include the Executive Office of U.S. Attorneys, the Criminal Division, the FBI, and LEAA. Deputy Attorney General Benjamin Civiletti, later Attorney General, did not employ and would not favor an ongoing system for monitoring the effectiveness of law enforcement in Indian country outside the ordinary channels of the Department.[135]

There is little or no monitoring on a national level of the FBI's investigative work in Indian country, nor is there any ongoing policy discussion about how best to employ those investigative resources in a time of diminishing budgetary resources. FBI Director William H. Webster in testimony before the U.S. Commission on Civil Rights discussed the

[133] Ibid., p. 68.
[134] Ibid., pp. 52–53 (notes omitted).
[135] Benjamin Civiletti, interview, Mar. 3, 1979.

possible assumption by BIA and tribal investigators of some or all of the responsibility for investigation of major crimes on Indian reservations and the lack of any national coordinating role. Asked if there was any ongoing discussion between the Department of Justice and the BIA, he said:

> It is my understanding that there really is not. BIA is highly dispersed in terms of its authority and activity. I'm not sure that there's been much carryover from the 1975 recommendations of the Department of Justice Task Force on Indian Matters.
>
> I think perhaps it would be well to try to reconstitute some discussions in this area. We are, as you pointed out, having on-the-site discussions with the U.S. attorney very much involved in particular areas.
>
> I've asked and I've been advised that the level of cooperation and coordination is spotty; it's very good in some places and nonexistent in others.[136]

Despite the FBI's key role in Federal law enforcement in Indian country, there is no systematic communication with other divisions of the Department of Justice or other Federal agencies on issues of policy. FBI Director Webster said, "I don't think that we have been involved in national policy with respect to the Indians in any significant way."[137] Statistics are not collected or monitored that would permit an evaluation of the problems on a reservation-by-reservation basis. Finally, there is no planning on a national level to compensate for decreasing FBI resources in Indian country.

Although the Department of Justice Task Force recommended greater use of the expertise of LEAA's Indian desk in implementing law enforcement responsibilities in Indian country, there has been little subsequent contact between the Indian desk and other divisions of the Department of Justice. Dale Wing, Chief of the Indian Criminal Justice Program of LEAA, reported:

> Departmental communication in the Justice Department with respect to Indian affairs is sporadic and responds to where the greatest pressure originates. At the time of Wounded Knee I was part of the task force. Following that I have not been privileged to meet with any departmental unit concerning Indian programs.[138]

More serious, however, is the decrease in funding for LEAA-sponsored Indian criminal justice programs. The Task Force on Indian Matters strongly urged an increase of LEAA training assistance to the BIA and tribal police and an expansion of the funding LEAA provided to tribal court systems. Discretionary funds for Indian criminal justice programs were available in the amount of $5 million in 1976. Programs were developed in such diverse areas as model correctional systems for Indian inmates and training of Indian court judges; criminal justice programs were also funded for individual tribes. For 1979, however, funding was cut more than 50 percent from the 1976 level—to $2 million. Mr. Wing reported:

> Anytime you cut off either the Bureau of Indian Affairs budget or plateau their funding level or you cut back on the amount of money that LEAA provides, it's going to influence and impact the Indian community very negatively. . . .
>
> In fact, there are going to be some hard decisions to be made as to which program is curtailed and which one is moved along. So because of the continuation process that we have going, anything that you cut out of the monies, then you're going to have cut one or two of the program areas.[139]

Nor can the Bureau of Indian Affairs pick up the slack when LEAA funding is reduced. The Chief of Law Enforcement Services of the BIA reported:

> Because they cut LEAA's money does not necessarily mean that we get an increase in our budget. . . .
>
> With rare exception, we have not been able to accommodate any of the programs that have been terminated by LEAA. . .because of the lack of funds. . . .So it creates a real problem, and although we coordinate as much as we can, there are still limited funds available, and when his program stops, the tribe does not have the money to pick up the program, the Bureau does not. It creates a great big impact and a hole

[136] Webster Testimony, *Washington, D.C., Hearing*, vol. II, p. 8.
[137] Ibid.
[138] Dale Wing, testimony, *Washington, D.C., Hearing*, vol. I, p. 134.
[139] Ibid.

that's left by the services formerly given by that program.[140]

There seems to be across-the-board agreement that improvement of tribal law enforcement and justice systems is critical; however, the lack of coordination within the Federal system has seemed to work against achieving improvement.

Another example of the negative results produced by lack of coordination has been the failure of the Federal Government to respond to the problems created by the decision in *Oliphant v. Suquamish Tribe,* which settled only part of the continuing conflict between tribes and States concerning jurisdiction over non-Indians on reservations.

Jurisdiction Over Non-Indians—Federal Inaction

Inevitably, the issue of whether tribal courts possess authority to try and punish non-Indian offenders became the subject of litigation. The case eventually to reach the U.S. Supreme Court arose in Washington State on the Port Madison Reservation of the Suquamish Tribe, an area of some 7,276 acres of which 37 percent is in trust status with the remainder held in fee simple title by non-Indians. The population of Port Madison consists of approximately 3,000 non-Indians and 50 Indians. The tribe in 1972 modified its law and order code to provide for criminal jurisdiction over all persons, both tribal members and nonmembers, on its reservation.

Oliphant, a non-Indian resident, was arrested by tribal authorities during a tribal celebration and charged with assaulting a tribal officer and resisting arrest. The circumstances under which the tribe had occasion to arrest him were described in the opinion of the Ninth Circuit Court of Appeals:

> When the Suquamish Indian Tribe planned its annual Chief Seattle Day celebration, the Tribe knew that thousands of people would be congregating in a small area near the tribal traditional encampment grounds for the celebration. A request was made of the local county to provide law enforcement assistance. One deputy was available for approximately one 8-hour period during the entire weekend. The Tribe also requested law enforcement assistance from the Bureau of Indian Affairs, Western Washington Agency. They were told that they would have to provide their own law enforcement out of tribal funds and with tribal personnel.
>
> Appellant was arrested at approximately 4:30 a.m. The only law enforcement officers available to deal with the situation were tribal deputies. Without the exercise of jurisdiction by the Tribe and its courts, there could have been no law enforcement whatsoever on the Reservation during this major gathering which clearly created a potentially dangerous situation with regard to law enforcement.[141]

Oliphant applied for a writ of habeas corpus to the U.S. district court challenging the tribal court's jurisdiction over him, which was denied. The Ninth Circuit Court of Appeals affirmed the denial, saying that the "power to preserve order on the reservation. . .is a *sine qua non* of the sovereignty that the Suquamish originally possessed" and no treaty or congressional statute had removed such powers.[142] The U.S. Supreme Court agreed to hear the case.

The *Oliphant* litigation had been widely recognized to have broad implications beyond the interests of the individual petitioners and itself became an arena of conflict between Indian and non-Indian interests. Indeed, the attorneys general for Washington and South Dakota appeared before the Court as *amicus curiae,* arguing that Indian tribes lacked jurisdiction to try and punish non-Indians. They were joined in their briefs by the attorneys general of Montana, Nebraska, New Mexico, North Dakota, Oregon, and Wyoming, all States with significant portions of Indian country. The Solicitor General of the United States, acting pursuant to the Federal trust responsibility for Indian tribes, also entered as *amicus curiae,* arguing the position of the United States that Indian tribes did, in fact, possess jurisdiction to try and punish non-Indians. Several national Indian organizations filed *amicus* briefs expressing the interest of all tribes in the issue of tribal criminal jurisdiction over non-Indians.

The U.S. Supreme Court in a 6 to 2 opinion written by Justice William H. Rehnquist reversed the court of appeals and held that Indian tribal courts do not have inherent criminal jurisdiction to try and punish non-Indians.[143] The Court found that both Congress and the executive branch had operated historically on the assumption that such jurisdiction did not exist, at least in part because tribes

[140] Suarez Testimony, ibid., pp. 134–35.
[141] Oliphant v. Schlie, 544 F. 2d 1007, 1113 (9th Cir. 1976), *reversed sub nom.* Oliphant v. Suquamish, 435 U.S. 191 (1978).
[142] *Id.* at 1009.
[143] *Id.*

did not have justice systems similar to or recognizable by the United States. This assumption was given significant weight by the Court in interpreting the purpose and effect of jurisdictional provisions in the early treaties, the Point Elliott Treaty with the Suquamish, and congressional jurisdiction legislation. Utilizing its recently modified rule of Indian treaty and statutory construction[146]—that "treaty and statutory provisions which are not clear on their face may 'be clear from the surrounding circumstances and legislative history',"[145] the Court determined that collectively the treaties and statutes imply the absence of tribal criminal jurisdiction over non-Indians.

The opinion is a departure from doctrines of Indian law enunciated in other decisions in this century by the United States Supreme Court.[148] Most important is the principle of Indian treaty construction in *United States v. Winans* that "a treaty was not a grant of rights to the Indians, but a grant of rights from them. . .a reservation of those not granted."[147] The Treaty of Point Elliott, between the United States and the Suquamish Tribe, is silent on the matter of criminal jurisdiction over non-Indians and thus, under *Winans,* would presumably be a reservation by the tribe of such jurisdiction. A commentator has noted:

> [B]y refusing to acknowledge the vitality of the *Winans* doctrine. . .Mr. Justice Rehnquist appears to prefer nineteenth century case law and vague readings of congressional intent, to the concept of tribal sovereignty that has been developed by the Court in this century.[148]

The Court acknowledged the development of Indian tribal courts, the procedural protections afforded to all persons subject to Indian tribal courts by the Indian Civil Rights Act of 1968, and the prevalence of non-Indian crime on Indian reservations that had led tribes to assert criminal jurisdiction, but held that these were all "considerations for Congress to weigh in deciding whether Indian tribes should finally be authorized to try non-Indians."[149] They "have little relevance," the Court said, "to the principles which lead us to conclude that Indian tribes do not have inherent jurisdiction to try and to punish non-Indians."[150] The holding and opinion were addressed solely to the matter of tribal jurisdiction to try and punish non-Indians for criminal offenses.

The Aftermath of *Oliphant*

The *Oliphant* case arose on a small reservation with a relatively large number of non-Indian residents compared to the tribal population. Despite the great diversities among Indian reservations and their populations, however, the U.S. Supreme Court's holding that Indian tribes lack jurisdiction to try and punish non-Indians committing offenses on their reservations falls with indiscriminate effect on all reservations. Substantial law enforcement problems have arisen in the wake of *Oliphant,* particularly in those reservations containing vast geographical areas crossed by major highways where there is significant non-Indian traffic, where Indian residential population and land ownership is intermixed with tribal land and population, or where there are considerable numbers of non-Indians temporarily present because of economic development or tourism.

The Supreme Court's holding in *Oliphant* precluded, at least without the consent of the accused, the prosecution of non-Indian offenders in tribal courts. The Court gave no guidance about what procedures are lawful for the handling of non-Indians accused of committing offenses on Indian reservations. Some of the jurisdictional questions that have resulted, with practical implications for day-to-day law enforcement, are whether tribal police may lawfully arrest and detain non-Indian offenders on the reservation and hold them for submission to local authorities, how to determine whether an accused offender is an Indian or a non-Indian, and whether and under what circumstances the State or the Federal Government has jurisdiction over offenses committed by non-Indians on Indian reservations.

As a result of the confusion about these jurisdictional issues, there has been great divergence of opinion and practice among various State, Federal, and tribal officials. Illustrative of the difficulties and inconsistencies in resolving these post- *Oliphant*

[146] DeCoteau v. District County Court, 420 U.S. 425 (1975).
[145] 435 U.S. at 208, n. 17.
[148] A critical analysis of the majority opinion in *Oliphant* is found in Comment, "Oliphant v. Suquamish Indian Tribe: A Jurisdictional Quagmire." *South Dakota Law Review,* vol. 24 (1979), p. 217 (hereafter cited as *Jurisdictional Quagmire*).
[147] 198 U.S. 371, 381 (1905). The Supreme Court utilized the *Winans* doctrine recently in United States v. Wheeler, 435 U.S. 313 (1978).
[148] *Jurisdictional Quagmire,* p. 231.
[149] 435 U.S. at 1022.
[150] *Id.* at 1022-23.

issues are the experiences of Federal, tribal, and State officials in South Dakota.

One unresolved issue is the appropriate procedure for determining whether an accused offender is an Indian or a non-Indian and therefore whether the tribal court has jurisdiction. A South Dakota State's attorney outlined the practical and legal difficulties in determining the status of an accused offender:

> [T]he problem is also inseparable with the problem of what actually constitutes an Indian person. We have again, as I understand it, a law case which in effect says that there is a two-pronged test: first, is there a recognizable amount of Indian blood, and, second, is he acknowledged as an Indian in the community in which he lives?
>
> Now this is great if you have several months and a lot of time and a lot of witnesses and the usual appellate procedures available to you. But it doesn't really give any guidance to the police who are charged with enforcing this, and, I don't know, it's part of the whole overriding problem here. How do you determine what happens?[151]

Tribal chairmen of the Oglala Sioux and the Cheyenne River Sioux expressed the view that the tribal court, rather than a police officer, should determine the status of an accused offender and therefore its jurisdiction:

> Not all white people are bad, but you know, we have Indians that look like white people too, blond hair, blue eyes, so it would be our opinion, since the *Oliphant* thing, is [for the police] to make the arrest and bring them in to a tribal hearing to determine whether they are Indian or non-Indian.[152]
>
> [Y]ou cannot ask a policeman out there when someone is breaking the law to stop and determine whether or not he is an Indian or a non-Indian. The policeman has no business making an assumption of whether or not he has jurisdiction over a person if he is breaking the law. That is the court's prerogative, and since the *Wheeler* decision that says that the tribal courts are not arms of the Federal courts, I believe that the tribal court has. . .to determine its own jurisdiction over any case that comes before it.[153]

Another issue left unaddressed by *Oliphant* is the authority of tribal police to arrest and detain a non-Indian offender for submission to local or Federal authorities, in the absence of a formal cross-deputization agreement. As an example of the practical difficulties caused by the uncertainty, officials in South Dakota hold widely differing opinions that result in great divergence throughout the State in how arrests of non-Indians are handled. David Vrooman, United States attorney for South Dakota, stated his own view that tribal officers do, in fact, possess such authority, although no guidance at that time (some 4 months after the decision in *Oliphant)* had come from the Department of Justice:

> I might say I don't think the Department has made an opinion yet as to whether the tribal officers have the right to arrest and turn over [non-Indians] to the States. My personal opinion is that based on the Treaty of 1889, that based on my understanding of case law which has developed for 100 years, and also based on the dissent in *Oliphant,* which I thought very well made the point, I think they do have the right to arrest non-Indians.[154]

Philip Hogen, State's attorney for Jackson and Washabaugh Counties, whose jurisdiction includes a portion of the Pine Ridge Reservation, was of the view that, in light of *Oliphant,* tribal police had no authority to arrest non-Indians based on their status as law enforcement officers but could make citizen's arrests under South Dakota law for offenses committed in their presence, with no greater or lesser right than other South Dakota citizens.[155]

On the other hand, Tom Tobin, State's attorney for Tripp County, South Dakota, whose jurisdiction includes portions of the Rosebud Reservation for purposes of State government, said he thought it was doubtful that tribal police officers had the authority to make citizen's arrests of non-Indian offenders and that he was not accepting complaints based on such arrests for prosecution in State court.[156]

Also left unanswered by *Oliphant* is whether so-called "victimless crimes," such as speeding, possession of drugs, or driving while intoxicated, committed by non-Indians on Indian reservations fall within the exclusive jurisdiction of the State or Federal courts or whether jurisdiction is concurrent.

[151] Leonard Andera, testimony, *South Dakota Hearing,* p. 75.
[152] Elijah Whilwind Horse, testimony, ibid., p. 86.
[153] Wayne Ducheneaux, testimony, ibid., p. 238.
[154] Vrooman Testimony, ibid., p. 189.
[155] Philip Hogen, testimony, ibid., p. 85.
[156] Tom Tobin, testimony, ibid., p. 168–69.

Leonard Andera, State's attorney for Brule County, South Dakota, summarized the difficulties the confusion presents for law enforcement in Indian country and his own view that the State does not have jurisdiction over minor offenses committed by non-Indians on Indian reservations:

> The difficulty that arises as a practical matter is that if the tribal court does not have "criminal" jurisdiction over non-Indians within the boundaries, then who does? And I can go along with the concept that the Federal Government may have jurisdiction for Federal offenses within the reservation boundaries, but the thing that the tribes will deal with from day to day are not Federal crimes. They are not major crimes; they are not the assimilated crimes, but they are instead traffic violations, intoxication violations, disturbing the peace, criminal destruction of private property, simple assaults—these are the types of things that they deal with. And in most instances, all the instances that I am aware of, these would be violations of State law. Now, we have the question then as to whether the State has jurisdiction to do anything within the exterior boundaries of an Indian reservation. If these offenses take place off a State highway, for example, if they take place on the Indian trust land does the State have jurisdiction to say you have violated a section of the State code? My own personal feeling is that they do not. . . .[157]

In contrast, the State's attorney for Jackson County stated his view that the State of South Dakota has exclusive jurisdiction over offenses committed by non-Indians anywhere in the State, including Indian reservations:

> Within Washabaugh County [the Pine Ridge Reservation] I do not consider that the State of South Dakota has jurisdiction over anyone that is an Indian. I consider that, pursuant to the *Oliphant* decision and the law that went before that, the State of South Dakota has jurisdiction over everyone not an Indian. I think the *Oliphant* decision said we solely would have that jurisdiction.[158]

These uncertainties have exacerbated tensions between Indians and non-Indians. A non-Indian rancher residing within the Pine Ridge Reservation, for example, expressed apprehension about the extent of authority of the tribal police to arrest non-Indian traffic offenders on the reservation:

> I think that, yes, there has got to be law enforcement. . . .I think there is a lot of misunderstanding among the people just exactly to what extent the tribe does have jurisdiction over people or where. . . .
>
> [I]n view of the *Oliphant* decision, in view of the lack of communication of whether or not they have a working agreement with the county, I feel that these individuals [the tribal police] do not have the authority to stop me.[159]

Conversely, Indian residents of reservations can legitimately ask whether non-Indians are, in effect, above the law because of the uncertainty about tribal arrest. The chairman of the Colville Tribe in Washington described the tensions there following *Oliphant:*

> [A]ll hell has broken loose back on the reservation between the tribe and county and the State court since *Oliphant* has been made public. . . .
>
> There had been cross-deputization between the State, county, city municipalities, and the tribal officers.
>
> That agreement that was signed by the sheriff and our chief of police is in effect; and yet one of our officers has just been arrested for. . .unlawful imprisonment. He arrested a non-Indian for reckless driving, endangering life and property. . . .
>
> It looks like the county got this individual to sign a complaint against our officer. . . .We are going to make it a tribal fight. . . .But I want to make clear that the individual citizens on the reservation are as concerned about the situation out there as we are. Our officers are the only ones that have been able to provide any sort of protection out on the reservation.
>
> Now, since *Oliphant,* it is wide open.[160]

Negotiations between tribal governments and local governments about the handling of non-Indian offenders have been hampered by uncertainty about the legal ground rules, particularly the authority of tribal police to arrest and detain non-Indian offenders and the allocation of jurisdiction between the

[157] Andera Testimony, ibid., p. 66.
[158] Hogen Testimony, ibid., p. 84.
[159] Marion Schultz, testimony, ibid., p. 128–29.
[160] Mel Tonashet, testimony, *Hearings on S.2502 Before the Senate Select Committee on Indian Affairs,* 95th Cong., 2nd sess., Mar. 9–10, 1978, pp. 230–31.

State and Federal Government for prosecution of "victimless" offenses.

There are currently nine reservation areas located in whole or in part in South Dakota, all occupied by different bands of the Great Sioux Nation. The handling of non-Indian offenders on these reservations indicates that the Federal Government has not played an assertive or effective role, either prior to or subsequent to the *Oliphant* decision. The effect is that reservation public safety has become subject to the willingness of local governments to enter into cooperative arrangements with the tribes for the handling of non-Indian offenders.

Pine Ridge

The Pine Ridge Reservation of the Oglala Sioux, the largest reservation in South Dakota, is located in the southwestern portion of the State. A population of approximately 11,000 people live on a land base of nearly 3 million acres. Following the 1973 occupation of the village of Wounded Knee and its aftermath of tribal factionalism and the significant presence of Federal law enforcement agencies, the public has perceived the Pine Ridge Reservation as an area of violence and lawlessness.

Despite the public view, however, personal working relationships have developed between some tribal officials and county law enforcement officials that have afforded a workable interim arrangement for the handling of non-Indian offenders.

Law enforcement for matters under State jurisdiction in the Washabaugh County portion of the reservation is the responsibility of the sheriff of Jackson County. A close working relationship exists between the Jackson County sheriff and the tribal police lieutenant whose reservation territory lies adjacent to Jackson County. If the tribal police arrest a non-Indian offender on the reservation, they will detain the offender until the sheriff can arrive and take the person into custody for prosecution. Sheriff Arnold B. Madsen of Jackson County and Lieutenant Ellsworth Brown of the Oglala Sioux Tribal Police described their arrangement for the handling of non-Indian offenders:

> COUNSEL. Lieutenant Brown, could you tell us how it's handled if you or one of your officers observe a non-Indian committing some sort of offense within Washabaugh County on the Pine Ridge Reservation?
>
> MR. BROWN. Well, the one thing that happened was that about 8 months ago one of my officers went and stopped a vehicle for a DWI [driving while intoxicated] and when we turned it over to Sheriff Madsen—well, the State's attorney went and had my officer go ahead and make citizen's arrest and then went to court up there in Kadoka and the person got convicted.
>
> COUNSEL. Did your officer testify in the State court?
>
> MR. BROWN. Well, yes, that is what I and Sheriff Madsen was talking about. That is the way we worked it out. . . .
>
> COUNSEL. What happens if, for example, you would stop an intoxicated driver who turns out to be a non-Indian? How do you handle that in terms of detaining the person?
>
> MR. BROWN. Well, I would call Sheriff Madsen over and have him take the matter. Until he makes the arrest, I will be the one that signs the complaint. . .I will hold him right where we're at. We have a substation down there where we keep them. And it's just a matter of minutes before Sheriff Madsen can get there.
>
> COUNSEL. Would you like to comment on what Lieutenant Brown said as far as handling of non-Indian offenders, Sheriff Madsen?
>
> MR. MADSEN. Yes. In our area, that is the way it works. And like I said, it's working real well between the tribal officers and myself.[161]

However, no formal cross-deputization exists between the tribe and the county. According to the State's attorney for Jackson and Washabaugh Counties, the tribal police in arresting a non-Indian are merely making a citizen's arrest, which would not allow them the immunities available to law enforcement officers if sued for misconduct.[162] Nevertheless, the State's attorney accepts for prosecution in the State court complaints from tribal police officers regarding non-Indian offenders, and in his view the informal system works smoothly.[163]

Similarly, in Bennett County, the diminished portion of the Pine Ridge Indian Reservation where checkerboard jurisdiction exists, the tribal police will transport a non-Indian offender observed committing an offense on trust land to the county sheriff's office for eventual prosecution in State

[161] *South Dakota Hearing*, p. 114.

[162] Hogen Testimony, ibid., p. 86. (Ordinarily a law enforcement officer is immune from civil liability if his actions were reasonable and in good faith.)

[163] Ibid.

court although, again, no formal cross-deputization agreement exists.[164] A tribal officer described the arrangement:

> Well, up until now we have arrested the person and produced them at the sheriff's office at which time we sign a complaint and incarcerate them if it was a jailable offense. . . .
>
> We take them to the county court or State court or whatever or the magistrate, see the magistrate for that matter and dispose of it that way.[165]

Asked if the State's attorney accepted the arrest as a citizen's arrest and took the offender to court, the tribal officer replied, "Yes, he does."

The cooperative working arrangements between county and tribal law enforcement officials in regard to the Pine Ridge Reservation demonstrate that, despite the jurisdictional complexities, a workable arrangement for the handling of non-Indian offenders is possible if all parties approach the matter in good will and good faith. The personal and noninstitutional nature of the arrangements, however, renders them vulnerable to changes of circumstances and changes of personnel in the official positions of the counties and the tribe.

Rosebud

In the early 1970s, the Rosebud Sioux Tribe entered into litigation against the State of South Dakota regarding the boundaries of its reservation. This culminated in a ruling by the U.S. Supreme Court in 1977 that the various allotment acts had diminished the exterior boundaries of the reservation to one of the four counties that constituted the original reservation created by treaty in 1889.[166] The remaining portion of the reservation, Todd County, is attached to adjacent Tripp County for purposes of county and State administration.

Since the *Oliphant* decision, the Rosebud Sioux, the Bureau of Indian Affairs, and the county government have not worked out a cooperative arrangement for handling non-Indian offenders, and no cross-deputization agreement exists.[167] Unlike Jackson and Bennett Counties, the State's attorney for Tripp County has declined to accept for prosecution complaints issued by tribal police to non-Indian traffic offenders, despite the fact that such a system existed in the 1950s before the tribe and the State became adversaries in the jurisdictional litigation.[168]

The gap in law enforcement has apparently led some non-Indians to believe that their conduct on Indian reservations is beyond the reach of the law. George Keller, Superintendent of the Rosebud Reservation Agency, Bureau of Indian Affairs, described an incident where a non-Indian traffic offender had flouted tribal police and the county authorities refused to take any action:

> I would like to point to an instant previous, in fact 2 days ago, where a non-Indian passed a tribal police unit equipped with red lights. The police unit had a radar system in it. The car that passed was exceeding the speed, I don't know, it was well—60, 65 miles an hour. She was cited. The ticket was taken to Winner. The tribal police officer was disallowed even to sign a complaint.[169]

Mr. Keller said that, in his view, the failure of the county and the tribe to reach an agreement for the handling of non-Indian offenders indicated that a system of Federal prosecution was necessary to protect the public safety on the reservation:

> I don't like to make an issue of these things, but I am in fact continually faced with them every day and night, and I am pushing to try to get some agreement set up. We are willing to meet in every respect with the State and try to get something worked out and with the tribe too. We are caught somewhat in the middle. The tribe did pass a resolution indicating they would like to have a Federal magistrate stationed at Rosebud, which in effect would answer a lot of these questions.[170]

Sisseton

After protracted litigation initiated by a reactivated tribal government in the early 1970s, the U.S. Supreme Court held that the Lake Traverse Reservation of the Sisseton-Wahpeton Sioux Tribe in northeastern South Dakota had in fact been terminated by the allotment process.[171] The tribe itself was not terminated and retained its Federal recognition, but the result of the decision was that the Federal Government and the tribe retained jurisdiction only over the remaining trust land within the

[164] Antelope Testimony, ibid., pp. 114–15.
[165] Ibid., p. 114.
[166] Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).
[167] *South Dakota Hearing*, pp. 157–58.
[168] Ibid., p. 158.
[169] George Keller, testimony, ibid., p. 160.
[170] Ibid., p. 169.
[171] DeCoteau v. District County Court, 420 U.S. 425 (1975).

former reservation area, with non-Indian-owned land under the jurisdiction of the State. Trust land and land under State jurisdiction are intermingled in a checkerboard pattern of jurisdiction.

The undiminished trust land portions of the Sisseton-Wahpeton Sioux Tribe lie within five counties in northeastern South Dakota. In 1976 and 1977 Eugene Trottier, Assistant Area Special Officer, Bureau of Indian Affairs, in recognition of the particular law enforcement problems occasioned by checkerboard jurisdiction, convened a series of informal meetings between tribal and county officials in an attempt to facilitate cross-deputization agreements. Mr. Trottier explained why cross-deputization is necessary for effective law enforcement in an area of checkerboard jurisdiction:

> There were many times that in an accident situation it took us a half hour or more, either with the sheriff's department or the highway patrol, trying to determine whose jurisdiction actually it was on. Without cross-deputization, I felt law enforcement officers just couldn't do their jobs. . . .
>
> I am convinced that the only way to have effective law enforcement is for the officer who observes the violation to be able to take the action and to get the successful prosecution.[172]

The tribe entered into a formal cross-deputization agreement with Marshall County, one of the five counties. Tribal police officers are cross-deputized as Marshall County deputies and Marshall County deputies are deputized as tribal officers, with the result that all law enforcement officers can function in both State and tribal jurisdictions in the county. According to both tribal and Marshall County law enforcement authorities, the cross-deputization arrangement has functioned well. Sheriff Ralph Olauson of Marshall County reported:

> Since this new cross-deputization went in effect, we haven't had any real problems. Most of the arrests that tribal police have made was speeding violations. There has been a few drunken driver violations. There was one question that went to court where the white man they had arrested for drunk driving, he didn't feel they had jurisdiction, and as the State's attorney explained to him, we had cross-deputization and he accepted that.[173]

In contrast, there exists a longstanding, pervasive lack of trust and cooperation between the tribal government and county government in Roberts County, the site of the town of Sisseton and the tribal headquarters, that has adversely affected the quality of law enforcement and the relations between Indians and non-Indians, despite efforts at mediation and conciliation by Federal officials.

Prior to the late 1960s, the tribal government of the Sisseton-Wahpeton Sioux was relatively unorganized and inactive. In the early 1970s, an activist tribal government came into existence and, utilizing grants and contracts made available under the Federal policy of Indian self-determination, undertook programs that generated rivalry and clashes with the county government and the non-Indian business community.[174] During the period of litigation in *DeCoteau v. District Court,* the uncertainties as to whether the tribe or the county government had jurisdiction exacerbated tensions between Indians and non-Indians and created chaos in law enforcement. Tribal Chairman Jerry Flute described the situation in Sisseton while the *DeCoteau* case made its way through the courts:

> During this period of time, the tribe, because of jurisdictional problems, and these were caused primarily by a number of lawsuits that were filed in the State and Federal courts and ultimately resulted in the U.S. Supreme Court decision that ruled the reservation boundaries had been terminated and the reservation was diminished to those parcels of trust land.
>
> [P]rior to the Supreme Court decision when the lower courts were ruling on the issue, we went through a period of about 2 months where there was absolutely no law and order for the Indian people on the reservation. The State courts had ruled and the appeals courts had ruled the State did not have jurisdiction over any Indian people anyplace within the boundaries of the reservation, and this left the tribe and the community in a chaotic situation that the tribe was not prepared financially or manpower-wise to quickly put into effect the judicial system or court system.
>
> The court rulings forced us to do this. It was the long-range plan of the tribe to eventually do this in a staged process. The lower court rulings forced us into this. This caused many problems within the community. When the case was

[172] Eugene Trottier, testimony, *South Dakota Hearing,* pp. 19 and 28.
[173] Ralph Olauson, testimony, ibid., p. 28.
[174] Jerry Flute, testimony, ibid., pp. 35–36.

> finally resolved by the U.S. Supreme Court and the decision was that the boundaries had been terminated and that the tribe had jurisdiction only over its own members on trust land again, we went through a chaotic period of time when no one really knew who had jurisdiction, where law enforcement started, where somebody else took over, whatever the situation was.[175]

The deteriorating relations between the tribal government and the county government and non-Indian business community resulted in the tribe's moving its headquarters from Sisseton to trust land outside the town, which further increased the isolation between the two communities.[176] Although county officials attended some of the informal meetings arranged by Mr. Trottier of the Bureau of Indian Affairs in an attempt to work out a cross-deputization agreement, the Roberts County commissioners ultimately voted not to enter into a cross-deputization agreement with the tribe.[177] During this period, the tribe began to assert criminal jurisdiction over offenses committed by non-Indians on trust land after the county terminated the previous arrangement of accepting complaints from tribal officers in the county courts.[178]

Following the *Oliphant* decision, the climate of ill feeling between the tribal government and county government resulted in the county's refusal to enter into any sort of cooperative arrangement for the handling of non-Indian offenders. The county sheriff holds the view that tribal police lack authority after *Oliphant* to arrest non-Indians who commit minor offenses on trust land, and the State's attorney has declined to accept such complaints from tribal police for prosecution.[179] Thomas DeCoteau, chief of police of the Sisseton-Wahpeton Sioux Tribe, said:

> We ain't doing nothing now. We catch non-Indians violating laws on the trust land, usually for traffic. We usually just stop them and let them go, because we attempted to file charges and the State court—State's attorney wouldn't accept it.[180]

Efforts at mediation and conciliation by Federal officers at the local and regional level have proved unsuccessful in bringing about an agreement for the handling of non-Indian offenders between the Sisseton-Wahpeton Sioux Tribe and Roberts County officials. The Community Relations Service of the Department of Justice, through officials from its Denver regional office, attempted over an 18-month period to bring about a cross-deputization agreement and to form a human relations commission to address the tensions between the Indian and non-Indian communities in Sisseton. Leo Cardenas, Regional Director of the Community Relations Service, expressed optimism that keeping lines of communication open might eventually bring about a resolution of the differences. He acknowledged, however, that the efforts of the Community Relations Service had yet to produce results: "We have not. . .seen positive results, you know, that we could take to the bank today."[181]

Officials from the Bureau of Indian Affairs have also been unsuccessful in their attempts to mediate between tribal and county officials an arrangement for the prosecution of non-Indian offenders on trust land. Walter V. Plumage, Area Special Officer in the Aberdeen Area Office of the Bureau of Indian Affairs, described his responsibility as a Federal official to help develop a working agreement between the tribe and the county for the handling of non-Indian offenders:

> [W]e at the area level. . .generally do not get involved unless it is requested. We had the local Sisseton agency try to work out an agreement with the County of Roberts as far as prosecution of non-Indians, because they were not being prosecuted. So, therefore, we stepped in, in an attempt to set up a meeting with officials at the county. . . .Nothing was resolved from the meetings.
>
> Like I say, we as a Bureau feel like it is our responsibility that when the life of Indian people are involved, there is a possibility they are going to be hurt or somebody is going to be killed, then it is our responsibility to move in and see if we can get things going in the right direction.[182]

He said that his attempts at mediation had no further utility, however, because of the apparent unwillingness of State and local officials to work out an agreement with the tribe:

[175] Ibid.
[176] Ibid.
[177] Trottier Testimony and Neil Long, testimony, ibid., pp. 19–21.
[178] Thomas DeCoteau, testimony, ibid., pp. 22–23.
[179] Ibid., p. 23.
[180] Ibid.
[181] Leo Cardenas, testimony, ibid., p. 234.
[182] Walter Plumage, testimony, ibid., pp. 177–78.

> I feel. . .that we as a Bureau, also as [the] tribe, have, attempted to work out an agreement. We are not getting the response of the State's attorney, local sheriffs, [or] the State of South Dakota attorney general's office. They don't want to work out an agreement. If they do, they are not coming forward and showing they want to do this.[183]

Mr. Plumage said it was his conviction that the Department of Justice must act to protect the safety of Indian communities such as Sisseton where efforts have failed to work out a cooperative arrangement with local officials for the handling of non-Indian offenders:

> I felt it was our responsibility first. I feel now we have done all we can do. . . .I feel now that, if we can't do anything, then the U.S. Attorney's office should attempt to enforce the assimilated crimes law or attempt to set up a Federal magistrate. . . .
>
> I would sooner see us work it out locally. If we can't, I feel it should be done at the Washington level, at the Department of Justice. The Attorney General has the authority to look into these matters.[184]

As the situations at the Rosebud and Sisseton Reservations show, the efforts of individual Federal officials to act as mediators in the development of cooperative law enforcement arrangements have been ineffective without the ability to invoke Federal prosecution of non-Indian offenders when State and local governments have failed to do so. In South Dakota the lack of a Federal response has, in effect, subjected public safety on reservations to the willingness of local officials to enter into cooperative arrangements for the handling of non-Indian offenders. That the Federal role, active or passive, is of critical importance is shown by other examples of the handling of non-Indian offenders after the *Oliphant* decision.

Cooperative arrangements that exist between a tribe and local government are always vulnerable to change, as demonstrated by the recent litigation brought by the Mescalero Apache Tribe against the United States.[185]

The Mescalero Apache Tribe occupies a reservation located entirely within the boundaries of Otero County in southern New Mexico, a mountainous area crossed by two State highways. Substantial non-Indian traffic passes on these highways through the reservation, and the tribe operates a ski resort that attracts non-Indian tourists. In the past, Bureau of Indian Affairs police were cross-deputized as deputy sheriffs, and they enforced State traffic laws when non-Indian violations occurred on the reservation, by citing them before State magistrates. Because of the satisfactory nature of this arrangement, the Mescalero Apache Tribe never attempted to exercise criminal jurisdiction over non-Indians prior to the *Oliphant* decision.[186]

Following *Oliphant,* however, the attorney general for New Mexico issued an opinion withdrawing the authority of BIA and tribal officers to enforce State traffic laws. The tribe filed suit in the United States district court requesting an injunction that would require Federal law enforcement agencies to enforce traffic laws against non-Indians pursuant to the Assimilative Crimes Act. Over the objections of the Department of Justice, the court issued an injunction mandating Federal enforcement for a 10-day period surrounding the Christmas holidays. According to the BIA's Special Officer for the Mescalero Agency, the injunction served its purpose:

> The enforcement of the traffic regulations, utilizing the Federal authority, has served its purpose of a deterrent factor and for both the Christmas and New Year's holiday weekends. As a result of strict enforcement of the traffic regulations, there were no reports of any serious vehicle traffic mishaps.[187]

The New Mexico State Legislature has subsequently taken action to restore the cross-deputizations for Bureau of Indian Affairs police assigned to the Mescalero Agency, so that non-Indian offenders can again be handled within the State system.[188] The point, however, was the critical role played by Federal law enforcement in the period during which no cooperative arrangements existed.

A contrast to the essentially passive role displayed by the Federal Government in South Dakota following the *Oliphant* decision is found in Arizona. The United States attorney there undertook to use his good offices to secure cooperative arrangements

[183] Ibid., pp. 178–79.
[184] Ibid., p. 178.
[185] Mescalero Apache Tribe v. Bell, No. 78-926C (D. N.M. filed Dec. 14, 1978).
[186] *Id.*, defendant's brief.
[187] *Id.*, motion for summary judgment.
[188] H.132, N.M. 34th Legis., 1st sess. (1979).

among tribal and local governments for the handling of non-Indian offenders on the 17 Arizona Indian reservations. He found that such arrangements "worked well in those Indian nations who have long-standing good working relationships with local and state governmental officials outside their borders."[189]

Where it was not possible to secure cooperative arrangements with local officials, however, the United States attorney made other arrangements: first, to cross-deputize tribal police officers, tribal fish and game officers, and BIA law enforcement officers as Federal officers, and, second, to authorize "issuance of citations into U.S. Magistrate's Court for certain misdemeanor violations by non-Indians committed in Indian country."[190] The Federal posture in Arizona thus provided what was lacking in South Dakota—Federal prosecution of non-Indian offenders in the event State and local authorities fail to enter into a cooperative arrangement with tribal authorities.

Implications for Future Jurisdictional Issues

The passive response or "non-response" of the Federal Government to the problem of handling non-Indian offenders after the *Oliphant* decision leaves Indian tribes hostage to potentially or actually hostile local governments. Indeed, the Federal response to *Oliphant* calls into question the commitment of the executive branch, particularly the Department of Justice, to the Federal trust responsibility for Indian tribes and the stated Federal policy of Indian self-determination.

The implications of the Supreme Court's decision in *Oliphant* on March 9, 1978, for the the public safety of Indian communities and the need for a Federal response was immediately apparent to Indian tribes and leaders. Philip S. Deloria, former director of the American Indian Law Center, on April 24, 1978, wrote to the Deputy Attorney General, Department of Justice, saying, "[W]e must recognize that the Court has presented us all with a situation where the tribes cannot protect themselves and where the reality of the case is that other jurisdictions have not filled the gap."[191] He called upon the Department of Justice to make a forthright public commitment that the peace and safety of Indian reservations would be ensured by whatever means necessary:

> [T]here must be a clear indication from the Department of Justice. . .that the Department considers the protection of the peace and safety of Indian communities to be a matter of the highest priority. Both Indians and non-Indians know when the Justice Department means business and when it is taking a pro forma position, and I'm sure that you are aware of the perception of Indians that in the past the Department has not taken a clear stand in favor of Indians. Surely such a stand is called for here where the federal responsibility is unambiguous. This step alone, if taken effectively, would have a powerful deterrent effect and would likely result in better protection for Indian communities [than] we have reason to expect at the present time.[192]

The "clear indication" sought from the Department of Justice has not been forthcoming, and Mr. Deloria's prediction has unfortunately been accurate, as demonstrated by Sisseton and Rosebud, that "those places where relations between Indians and the surrounding communities are the worst will be the very places where law enforcement will be lacking."[193]

Of course, the legal and political attacks on tribal jurisdiction will not end with the ruling by the Supreme Court on tribal criminal jurisdiction over non-Indians. The Court in *Oliphant* was silent on the issues of whether tribes may exercise civil regulatory jurisdiction over the conduct or property of non-Indians on Indian reservations.

The issues of civil regulatory and taxing authority of Indian tribes is critical to the continued viability of the Federal policy of Indian self-determination. The ability of an Indian tribe to exercise control over its territorial and economic base through land use planning and taxation is essential to its political, economic, and cultural autonomy. A commentator has stated the significance of this issue:

> With such jurisdiction [to exercise land use planning and zoning control], a tribe may regulate or prohibit the development of reserva-

[189] Hawkins Statement, *Washington, D.C., Hearing*, vol. II, pp. 7–8.
[190] Ibid.
[191] Philip S. Deloria, letter to Benjamin Civiletti, Deputy Attorney General, Department of Justice (Commission files).
[192] Ibid.
[193] Ibid. Factors affecting the lack of a response to the law enforcement difficulties occasioned by *Oliphant* include a fragmented decisionmaking process within the Department of Justice in regard to Indian matters, a dispute between the Department of Justice and the Department of the Interior regarding the allocation of jurisdiction between the Federal Government and the States for victimless crimes, and the lack in general of a coherent Federal Indian policy.

> tion lands, and thus exercise a measure of control over the future of its reservation. Without zoning jurisdiction, most tribes would be forced to submit to the judgments of non-Indians about the uses of reservation lands.[194]

No doubt the issue of tribal civil jurisdiction over non-Indians will soon be presented to the Supreme Court. Already, a Federal court in the Western District of Washington has ruled, based on *Oliphant,* that tribes do not have the authority to zone fee land owned by non-Indians within the boundaries of a reservation.[195] On the other hand, a Federal district court in Arizona has ruled, *Oliphant* notwithstanding, that the Navajo Tribe has the authority to tax non-Indian interest in leased land on the reservation.[196]

A number of courts, as discussed previously, have held that non-Indians and their property within reservation boundaries are subject to tribal civil regulatory and taxing ordinances. Regulation is meaningless, however, without the authority of enforcement against those who choose to defy the regulating jurisdiction. *Oliphant* has brought into question the ability of tribes to enforce civil regulations against non-Indians within reservation boundaries.

It appears clear that the Federal Government will be called upon to ensure that the Federal policy of Indian self-determination does not become meaningless rhetoric in the face of opposition by non-Indians and State governments. Already, Federal criminal statutes exist that provide Federal prosecution for violations of certain tribal civil regulatory laws.[197] In the event that the Supreme Court denies to tribes enforcement authority for tribal taxing and land use of regulations against non-Indians, Congress will be called upon to provide the jurisdictional mechanism for Indian self-determination.

Congress has the plenary authority to authorize tribal court jurisdiction over all persons within reservation boundaries, including non-Indians, for any and all violations of tribal criminal and civil regulations. An alternative would be for Congress to grant to Indian tribes the authority to prosecute civil violations in Federal court.

Or the Federal Government could continue its stated policy of Indian self-determination, but also continue its passive role displayed in the wake of *Oliphant* and in effect leave tribal self-determination vulnerable to potentially or actually hostile State and local governments and their non-Indian citizens.

The conflict over jurisdiction is political and economic. As a commentator summarized:

> The ultimate lesson, however, is that jurisdictional doctrine cannot be understood apart from the historical, political, and institutional framework within which it is applied. Jurisdictional rules may be framed in terms of sovereignty, but they evolve as prevailing assumptions about the functions of power change and as the consequences of the exercise of that power change as well.[198]

Findings

Federal Law Enforcement

1. Through the historical development of treaties, statutes, and case law derogating tribal functions, the Federal Government has assumed primary responsibility for law enforcement in Indian country.

2. The United States attorneys of the various Federal districts containing Indian land have primary responsibility for the prosecution of serious criminal offenses occurring in Indian country.

3. Through custom and historical circumstances, the Federal Bureau of Investigation has assumed primary responsibility for the investigation of serious felony offenses occurring in Indian country that fall under the Major Crimes Act (18 U.S.C. §1153).

4. Many facets of Federal law enforcement in Indian country have received widespread, repeated, and justified criticism from public and private organizations over the past decade.

5. The statistics kept by the Federal Government regarding law enforcement on Indian reservations do not permit accurate analysis or systematic monitoring of the quality of law enforcement.

6. The FBI's role in investigating criminal offenses in Indian country, for the most part, results in delays and duplication of the efforts of Bureau of Indian Affairs and tribal investigators.

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[194] Comment, "Jurisdiction to Zone Indian Reservations." *Washington Law Review,* vol. 53 (1978), pp. 677-78.

[195] Trans-Canada Enterprises v. Muckleshoot Indian Tribes, No. C77-882M (W.D. Wash. 1978), 5 Indian Law Rep. Sec. F-153.

[196] Salt River Project Agricultural Improvement and Power Dist. v. Navajo Tribe of Indians, No. 78-352 (D. Ariz. July 11, 1978), 5 Indian Law Rep. F-116.

[197] For example, 18 U.S. C. §1159 (misrepresentation of products as Indian-made); §1161 (tribal liquor laws); §1165 (tribal hunting and fishing regulations) (1976).

[198] Carole Goldberg, "A Dynamic View of Tribal Jurisdiction to Tax Non-Indians," *Law and Contemporary Problems,* vol. 40, no. 1 (1976), p. 189.

7. The current level of FBI resources available for the investigation of criminal offenses in Indian country is insufficient.

8. The FBI provides no specialized training for its agents assigned to investigatory duties in Indian country.

9. Indian perceptions of FBI agents as "outsiders" hampers their investigative efforts in Indian country; FBI agents are perceived widely in the Indian communities as biased against "militant" Indians and Indian organizations.

10. Procedures for investigating allegations of agent misconduct are inadequate in the following ways:

- No regulated, publicly promulgated, complaint-intake procedure exists.
- Complainants are not notified of the disposition of their complaints.
- The monitoring of complaint procedures and compilation of data are inadequate.

11. Federal law enforcement in Indian country is extremely difficult because of the enormous geographical distances and the cultural separation between Indian communities and the nontribal prosecutorial and judicial systems.

12. The disproportionately high rate of Federal declination of prosecutions in Indian country adversely affects public safety in Indian communities.

13. The Federal Government is providing insufficient prosecutorial resources to meet the responsibilities it has assumed in Indian country.

14. There is no coordination or systematic monitoring within the Federal bureaucracy of Federal law enforcement responsibilities in Indian country.

15. The lack of a coordinated Federal approach results in individual rather than institutional decisionmaking, inefficient use of resources, and failure to take advantage of lessons learned by past experiences in the performance of Federal law enforcement functions.

16. The decision of the United States Supreme Court in *Oliphant v. Suquamish Tribe,* which held that Indian tribes lack jurisdiction to try and to punish non-Indian offenders, has caused substantial law enforcement problems on those reservations where significant numbers of non-Indians are present.

17. In some areas, tribes and local governments have been able to work out cooperative arrangements for the handling of non-Indian offenders.

18. The Federal Government has not taken sufficient action to ensure the safety of Indian reservations from non-Indian crime.

19. The Federal Government has not sufficiently asserted the legitimacy of the exercise of governmental powers by Indian tribes.

Recommendations

Law Enforcement

1. The Department of the Interior should conduct a review and provide its findings to the Department of Justice on the status of law enforcement on all Indian reservations, identifying those areas of difficulty in the arrest and prosecution of non-Indian offenders.

2. In light of the *Oliphant* decision, the Department of Justice, through the Attorney General, should publicly state its commitment to the protection of public safety on Indian reservations from non-Indian offenders by whatever means are necessary and effective.

3. The Department of Justice should undertake the following steps to implement its commitment to public safety on Indian reservations, in consultation with affected tribal governments:

- Employ the good offices of Department officials, including the U.S. attorney and the Community Relations Service, to encourage the development of a cooperative working arrangement between tribal and local governments for the arrest and prosecution of non-Indians committing offenses on Indian reservations.
- In the event that arrangements cannot be developed for prosecution of non-Indian offenders in the State system, a directive should be issued by the Department of Justice through the *Manual for United States Attorneys* that non-Indian offenders be prosecuted in U.S. district court or magistrate's court.
- In those situations where there is reason to believe that State or local authorities are discriminatory in failing to prosecute non-Indian offenders committing offenses on Indian reservations, the Civil Rights Division of the Department of Justice should investigate and seek appropriate injunctive relief in the U.S. district court under Title II of the Indian Civil Rights Act.

4. The Department of the Interior, in consultation with the Department of Justice and tribal governments, should undertake a program to up-

grade tribal police forces so that all State requirements for cross-deputization can be satisfied.

5. Congress should enact legislation permitting Indian tribes, at their option, to assume criminal jurisdiction over all persons within reservation boundaries, in compliance with the limitations and procedural guarantees specified by the Indian Civil Rights Act.

6. The FBI charter should be amended to provide the following types of checks on agent misconduct:

- Oversight responsibility of the House and Senate Judiciary Committees, assigned in the proposed charter for the FBI (S.1612, 96 Cong., 2nd sess.), should specifically provide both committees with full access to information about FBI internal investigations of allegations of misconduct.
- A civil right of action for recovery of damages for violation of the charter's mandate should be included.

7. The FBI should provide complainants who allege misconduct by FBI agents with information about the disposition of their complaints.

8. The Department of Justice, in consultation with the Department of the Interior, should establish a uniform system for the collection of statistics by reservation on criminal complaints and their disposition.

9. The FBI should be relieved of its primary role for investigating major crimes occurring in Indian country, and this responsibility should be assumed by the Bureau of Indian Affairs and tribal investigators, with the FBI providing back-up support as requested. The FBI should also be utilized on reservations similarly to the ways it is utilized in other governmental jurisdictions, such as in the investigation of generally applicable Federal statutes.

10. The FBI should be directed, and should be provided with adequate resources, to train BIA and tribal investigators in investigative techniques.

11. United States attorneys should be directed to accept referrals for prosecution directly from BIA and tribal investigators.

12. Federal officials assigned responsibilities in Indian country should be given specialized training in Indian law and culture.

13. Additional assistant United States attorneys and Federal judges should be assigned to Federal districts containing Indian country to assure adequate prosecutorial and judicial resources to meet the Federal responsibility.

14. The jurisdiction of tribal courts should be expanded to include offenses committed by Indian and non-Indian defendants with maximum sanctions of imprisonment for 1 year or a $1,000 fine.

15. The Department of Justice and the Department of the Interior should establish an interagency coordinating committee on Federal law enforcement effort in Indian country to monitor statistical patterns of criminal offenses on individual Indian reservations; to determine what Federal law enforcement, prosecutorial, and/or judicial resources or training are necessary or desirable to improve the quality of criminal justice on particular reservations; and to examine local experiences with Federal law enforcement in Indian country to ascertain what innovative practices may be useful on a wider scale.

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Chapter 6

Findings and Recommendations

Summary

This report traces the role of State, tribal, and Federal governments in some of the major conflicts that exist between Indian tribes and non-Indians. These conflicts have attracted much notoriety and have been considered significant factors in what has been perceived as a backlash against Indians over the past decade. Although the so-called "backlash" was more a change in the public view than any significant change in Indian and non-Indian relations, these conflicts and the manner in which they are resolved have profound implications for the civil rights status of American Indians.

In all of these situations, the role of the Federal Government has been a crucial one. The origins of the conflicts occurred decades or even centuries before the label "crisis" was attached. Throughout the development of these complex situations, critical actions have been taken. Sometimes events transpired without any governmental recognition of their significance and opportunities for resolutions were missed. More often, however, the key factor seems to have been nonaction on the part of the Federal Government, the seeming inability of the United States to implement effectively the promises and commitments it has historically made to tribes. For example, in the instance of the eastern land claims, a series of Federal treaties and acts of Congress were completely ignored. In addition, no effective apparatus existed at that point for monitoring Federal commitments or for putting them into practice.

There are lessons to be learned from the way the current problems have been managed. It is obvious that the climate for conflict between Indian rights and the interests of the larger society, or a particularly vocal or powerful segment of the larger society, will continue for the foreseeable future. Conflict is inherent in the nature of the relationship between the United States and the tribes. Indians still retain power and resources that are periodically coveted by various elements in the larger society. The clashes have been and will continue to be played out in many arenas, including the courts, the legislative and executive branches of the Federal Government, and, to some extent, the international human rights community.

Much of the impetus for this report came from the perceptions of many people that an ominous backlash against Indians and Indian rights was occurring nationally. Chapter 1 delineates the atmosphere in which the so-called backlash occurred, indicating that most Americans have very little understanding of Indians. Legal decisions or other governmental actions that are consistent with a century of precedent seem unusual or even deviant in a milieu of ignorance. Complicating this basic lack of vital information about Federal Indian law and the history of Indian tribes on this continent is the persistence of racial stereotypes. It is in this context of ignorance and stereotypical thinking that recent events occurred, and the resulting emotionalism became a basis for the perception of a backlash.

Although Indians have had periods of tribal activism, and were correspondingly the subject of much public attention, the period of the 1950s through much of the 1960s was one of relative dormancy. The energies of many tribes and Indian

individuals were frequently devoted to coping with the Federal policies of termination, relocation, and jurisdictional transfer. At this time the Federal Government was attempting to "get out of the Indian business." Some tribes were terminated and their assets removed from trust protection status and often sold. States were given greatly enhanced power and jurisdiction in reservation areas, and Indian individuals by the thousands were encouraged to leave reservation communities for the phantom promise of job training and employment in urban areas.

This quiescent era ended in the sixties when a variety of activities and movement occurred on many fronts. Activist Indians occupied significant symbolic sites such as Alcatraz, Wounded Knee, and the headquarters of the Bureau of Indian Affairs in Washington, D.C. National Indian organizations were created or expanded, and they began to play a more active role in promoting Indian interests. Indian college and professional school enrollments and graduations increased significantly. The executive branch repudiated the policy of termination and successive administrations adopted a policy of Indian self-determination—a policy favoring Indian control over decisionmaking and promoting tribal interests. Important legislation developed that was favorable to the tribes—the restoration of the previously terminated Menominee Tribe, the Indian Health Care and Improvement Act, and the Indian Self-Determination Act. Significant legal victories were also obtained in the courtrooms. Decisions favoring tribal sovereignty were rendered in areas involving taxation, land use controls, and regulation of reservation affairs. Treaty rights of the tribes in the emotion-charged, controversial area of hunting and fishing were recognized by the courts. On reservations, tribal governments were operating in expanding areas, which in some cases had been the province of the Bureau of Indian Affairs.

By the middle of the seventies, non-Indians on and near reservations had organized local, State, and national organizations. These groups, particularly the Interstate Congress for Equal Rights and Responsibilities, were widely viewed as the backbone of a visible backlash against Indians. Generally these organizations were formed in reaction to a tribal legal victory, an assertion of tribal governmental power, or the threat of an exercise of tribal powers. The goals promoted by these organizations—termination of reservations, ending the trust status of tribes, abrogation of Federal treaties with tribes, particularly those involving fishing rights—began to receive fairly widespread publicity.

The anti-Indian arguments were often miscast in psuedo-civil rights terms. For example, although the law states to the contrary, honoring treaty rights with respect to salmon fishing was alleged by opponents in this debate to violate the constitutional rights of non-Indians who fished. Indians were pejoratively labeled "supercitizens." Legislative proposals that reflected these viewpoints were prominent in the 95th Congress (1977–1978). Foremost among the proposals, in terms of publicity and the attention it received, was the Indian Equal Opportunity Act of 1977, a bill that would have abrogated treaties and terminated reservations. It did not pass, nor did any of the other so-called backlash legislation. The 95th Congress instead produced some reasonably positive Indian legislation. When the proposals associated with the "backlash" failed to achieve any success, the attention and publicity surrounding the "backlash" began to diminish.

The issues in contention and the antagonists, however, remain in place. To evaluate these conflicts, a fundamental understanding of the constant factors in Indian and non-Indian relations is necessary. The backlash in many senses appears to have been no more than the heating up of the long term conflict inherent in Indian and non-Indian relations. Were it not for the underlying lack of knowledge about Federal-Indian relations and Indian law and the persistence of racial stereotypes, it is unlikely that these events would have been regarded as a backlash.

Chapter 2, Context For Evaluation, is divided into four sections: Historical Overview, Legal, Traditional Civil Rights Problems, and State-Tribal Government Relations. The historical overview traces the major events in Federal-Indian relations and provides a brief analysis of their significance. Federal Indian policy has its origins in the colonial policies of the various European countries that, in the process of "discovering and settling" this continent, evolved legal theories and policies for dealing with the Indian nations already in residence. The United States Constitution and the earliest acts of Congress take into account the existence of Indian tribes and the need for a protective policy toward them. Federal policy would vacillate over the next two centuries from this posture of protection of tribes and their separation to policies strenuously advocat-

ing termination of the Federal protective relationship and assimilation, both encouraged and forced, of Indians into American society and values.

The legal section of the chapter delineates broad concepts unique to Federal Indian law—the governmental status of tribes, the United States trust relationship to the tribes, the inherent nature of tribal government powers, the limitations of State power within Indian reservations, and the plenary power of Congress over Indian affairs. As Federal Indian law is a unique and distinct field, so is the status of Indians as minorities. In some instances Indians can be defined as a racial minority, and in other settings they are a political grouping. When the Federal Government is dealing with Indians as part of its special relationship and responsibility to tribes, Indians are considered a political grouping. It is not, therefore, unconstitutional racial discrimination to provide an Indian preference employment policy within Federal agencies designated to service tribes. If, however, a local or State government or governmental unit outside of the special "trust" relationship excluded Indians from voting or held Indians to more stringent bail requirements than non-Indians, such actions are viewed as unconstitutional racial discrimination.

The third portion of chapter 2 explores traditional civil rights problems faced by Indians, historically and currently. The development of Indian civil rights activism has been distinctly different from that of other minorities. Other minorities are not political entities—governments—and their primary goal has been to make the existing system include them and work for them. Indians, on the other hand, are political entities whose primary objective has been to preserve their own institutions and associated value systems. Their political distinctness, however, has not prevented racism, the same condition facing other minorities, from permeating Indian policy and working serious and long term effects on the tribes.

Expressions of the racial inferiority of Indians recur with unfortunate frequency in the debates on Indian policy in the not so distant past. Although such racism today is rarely as blatant as in the past and is no longer considered acceptable public policy, the impression still lingers in the public mind that Indians are not entitled to the same legal rights as other citizens in this country. Beneath the surface of a public policy committed to Indian self-determination, the effects of centuries of racism persist.

In the last three decades, the Nation has focused increased attention on the civil rights problems of its different minority groups. Various studies of the Federal Government document that Indians have faced and continue to face the whole spectrum of civil rights problems, including pervasive discrimination in voting rights, educational opportunities, the administration of justice, and the provision of social services. There is, however, some ambivalence among Indians about pursuing their civil rights because they fear that in the process their separate tribal rights will be sacrificed.

The fourth and final section of chapter 2 concerns the relations between tribal governments and State and local governments. These entities have been longtime adversaries. Much of their relationship is institutional and perhaps always will be to some extent. This adversarial relationship has its origins in the early history of the United States. A guarantee the tribes received from the Federal Government in exchange for their lands and friendship was protection against local non-Indians. The inability of the Colonies to control violations against Indian territory and rights under the Articles of Confederation was a factor in the centralization of authority in the Federal Government.

In effect, the presence of the Federal Government in Indian affairs has been to protect the tribes against the States and their non-Indian citizens. Through its many vacillations and changes in Federal Indian policy, however, the United States Government has contributed to the potential for conflict between States and tribes. For example, the Federal policies of cutting tribal lands into individual parcels and opening the "surplus" for homesteading by non-Indians has significantly contributed to many current conflicts. The reservations affected are jurisdictional checkerboards that now contain significant non-Indian populations.

There are many levels of conflict today between tribes and their non-Indian neighbor governments that involve the entire range of civil jurisdiction, particularly the power to tax, competition for funding, and the use of scarce resources. Some of this conflict would exist even if none of the governments involved were Indian; such competition also occurs with some frequency between non-Indian governments. Within this framework of intergovernmental competition, however, are also opportunities for cooperation and joint projects. Some localities and States have made positive efforts to advance

these possibilities, and coalitions of Indian tribes and local government are actively exploring avenues for cooperation. It is clear however, that not all areas lend themselves easily to negotiation. Protracted litigation and acrimonious conflict are possible in many of these issues, and the role the Federal Government plays will determine the direction and outcome of many of these potential battles. Water rights is a crucial area where this role is currently being determined.

Chapter 3 concerns the conflict between Indians and non-Indians over fishing rights, a conflict that began in the late 1800s. The rights involved, however, stem from treaties negotiated in the 1850s through which tribes in the Washington Territory relinquished their claims to vast land areas in return for a number of Federal promises. One of these, founded in a recognition of Indian fishing rights, was a promise that Indians could continue to fish where they always had fished, exclusively on reservation and in common with the citizens of the territory at the Indians' usual and accustomed grounds and stations off reservation.

Indians were the unchallenged fishcatchers of the area until events made non-Indian, quantity fishing profitable. At about this time, Washington became a State and began to exercise the exclusive rights it believed it had over all fishing, including that of Indians. Largely, this meant encouraging commercial fishcatchers and creating few restrictions.

As the State's population grew and State government developed in size and strength, and as the supply of fish was being noticeably reduced, the State became more active in the process of regulating fisheries. The regulation was political, designed to favor non-Indians and, within that category, particular groups of non-Indians. By preventing most river net fishing for salmon, non-Indian deep water fishing methods were encouraged, and by preventing commercial sale of steelhead or methods of catching them other than hook and line, non-Indian sport fishing for that specie was protected. Instead of controlling fishing in a way that would allow Indians and non-Indians to share the resource, the State effectively eliminated traditional Indian fishing methods by making them unlawful.

The United States did little to keep the State from effectively taking the fish resource from the Indian tribes. Some arms of the Federal Government were participating in the destruction of the resource through dam construction and other activities that destroyed fisheries for Indians as well as others. The Federal Government also missed opportunities to coordinate fishing activities so as to make more fish available for tribal catches in terminal areas.

As the fishing effort grew and the environmental damage took its toll, there were fewer and fewer fish to go around. Hatcheries were looked to as a way to save the resource and to support the overcapitalized, non-Indian commercial fishing efforts. Drawbacks to artifical propagation of fish and potential environmental hazards were played down.

Indians protested the taking of their rights, and some went to jail for fishing in accordance with Federal treaty rights but in violation of State law. Occasionally, Indians were successful in court, stopping some of the more extreme State interference with their rights, but aside from piecemeal litigation, there was not full recognition of their rights or a serious effort to protect them until the United States sued in Federal district court in 1970.

The resulting decision by the Federal judiciary in 1974 changed much of what had been assumed about State power over treaty Indian fishing. The court found that Indians did have separate rights to a significant share of the fish and, further, that the State not only had to refrain from interfering with those rights, but also had to protect them. Tribes were recognized as having fishery management rights of their own.

This clear victory for Indians was a severe shock to non-Indians, and they were not about to accept it without a fight. Private, non-Indian fishing interests violating Federal court orders and State institutions refusing to accept Federal judicial decisions combined to produce a crisis that called for a response at the national level. The crisis included vilification of the Federal trial judge, and it was fueled by the conviction of many non-Indians that his decision honoring treaty fishing rights was wrong. If it were right, how could the huge non-Indian fishery have been permitted to develop? Why had traditional Indian fishing been prevented or minimized for so many years? Indeed, these are good questions whose answers are found in the policies established by previous generations that had ignored treaty fishing rights. Had Indian treaty fishing rights been honored and protected by the Federal Government in line with its clear responsibility throughout the century, the situation could not have developed to a point where non-Indians saw treaty rights as functionally meaningless. Nevertheless, the decision was viewed

as a denial of non-Indian rights and an unfair windfall to Indians. It was not generally viewed as the law, and it was regarded as justifiable to disobey it.

The Members of Congress from Washington State saw a need to do something about the crisis. As a result of their request, a Federal task force was established at the cabinet level in Washington, D.C., with counterparts at the Federal regional level in Seattle. Its mission was to find a solution that would stop the open confrontation. Through its regional team, a negotiation process was begun in which the team and its staff negotiated with the tribes and non-Indian fishing groups individually.

It was unclear throughout the process what authority and power had been delegated to the regional team. Neither the tribes nor the non-Indian fishermen knew to what extent the regional teams' negotiation effort might be linked with the very different roles its members had in the onging Federal litigation. It was also unclear whether the regional team would interact with Congress in a manner that might force a solution through legislation or affect funding for federally-assisted projects, such as hatcheries or even unrelated programs.

The task force and its regional team had both positive and negative aspects. They provided a possible means for getting tribes, non-Indian fishing groups, and the State to reconsider their positions and move toward some common ground that, by agreement, would solve the controversy while giving effect to treaty fishing rights. They were also entities created of whole cloth, unknown in this dispute previously, yet possessing the potential to suggest a wide range of Federal actions that could, if acted upon, greatly alter existing rights and relationships. To the tribes, successful implementation of their treaty rights with the aid of this group was seen as a possibility, but there was also the possibility that this would detract from tribal victories in court. Once again, tribes were defending their rights. After they had won in the conventional court system, a new entity was created, and they were back in the fray with few ground rules to define the perimeters of the new battle.

Several factors were considered by the regional team. These included: the need to stop the open defiance of Federal authority; the need to reduce the stress on the fish resource caused by uncontrolled illegal fishing; the need to reduce and, preferably, to eliminate the ongoing Federal presence in a way that would be acceptable to all parties in the conflict, if possible, and, if not possible, at least to those with the political power to require a resolution.

Although efforts to enforce the 1974 court decision through Federal agencies were increased to compensate for a total State default in enforcement late in 1977, the regional team was not suggesting strong enforcement as part of its strategy. As it turned out, the regional team wanted to create a new system to replace existing methods of governing the fish resource and a new way of defining Indian rights to that resource.

The regional team approached the task as though it involved several groups, Indian and non-Indian, each with a legitimate claim to part of the fish resource. A series of trades and compromises were suggested, and then a settlement plan was proposed to which, it was hoped, everyone involved would agree. No consideration was given to the propriety of taking away treaty rights or to any need to compensate tribes for any rights taken.

The solution proposed reflected the judgment that all parties should compromise in order to settle the matter. This view overlooked the fact that the tribes were not the cause of the problems faced by non-Indians, but rather that governmental mismanagement in conjunction with the ignoring of treaty fishing rights had produced an untenable situation. Yet the tribes were expected to compromise and to recast their rights for the sake of order.

Although there was no acceptance of the settlement plan finally offered, there now exists a proposal for a "solution" to the controversy, several hundred pages in length, which represents over a year of Federal effort. It is available for use entirely or in part to those in the legislative and executive branches in a position to consider further approaches to the controversy.

Even while the regional team was looking for options, more litigation was being processed in State and Federal courts in which the State and its recalcitrant, non-Indian fishcatchers were working hard to get the Federal district court decision dismantled. The nature of the judicial battle changed from emphasis on an interpretation of treaty rights to a conflict between Federal and State judiciaries, in which treaty rights became a secondary issue to some of the litigating parties. Several cases moved into a position one step on the judicial ladder before reaching the U.S. Supreme Court.

The tribes wanted their rights enforced without risking yet another redetermination of what rights they possessed. They opposed further judicial review. The non-Indian fishing groups saw their chance to get the decision they had been resisting for the last 5 years before the Supreme Court, which they believed would certainly overturn it. The State wanted to regain control over its fisheries on its own terms, and so it was eager for review. The Federal Government was interested in getting order back into the fisheries so it could remove the extra forces it had deployed to deal with the open defiance of the Federal court. Federal representatives reasoned that the resistance would stop if the treaty rights were upheld by the highest court in the land. Of course, if the treaty fishing rights decision of the lower court were overturned, there would still be no need for large scale Federal enforcement because the State would be back in control and Indian rights would be reduced.

All the dynamics were again unfavorable to the tribal position of staying out of court, and the case was heard on appeal over tribal objections. In July 1979 the U.S. Supreme Court rendered a decision rejecting the views of the non-Indians. The Court upheld the Federal district court almost completely. Indian rights had again been vindicated. The matter is now pending in the congressional forum

Chapter 4 concerns Eastern Indian land claims, which has been the "sleeper" among Indian rights. The pervasive public ignorance of Indian issues, and the attitude of State officials for centuries that they could do whatever they wanted with respect to Indians, set up a situation in which the claims seemed extraordinary when finally brought. The basic land claim is that Indian lands in States formerly constituting the the original Thirteen Colonies were invalidly transfered to non-Indians because the Federal Government did not supervise or approve the transactions, which by statute it had pledged itself to do. When the tribes began to present their claims, they were greeted with disbelief; their offers of negotiation were spurned. After several court victories that, although not determinative, did demonstrate the seriousness of the legal claims, serious effort at negotiation of the claims began.

The United States has had an unhappy history with the eastern tribes, several of whom were important allies in the Revolutionary War. The Maine tribes, for example, were primarily responsible for the northern location of the border with Canada. The Indian Trade and Intercourse Act of 1790, known as the Nonintercourse Act, was designed to keep friendly relationships with the tribes and to protect them as allies. It provides that:

> No purchase, grant, lease or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered pursuant to the Constitution.

Shortly after the Congress enacted this legislation, the tribes began to lose land in violation of the act. Congress had not established any mechanism for enforcement of the rights protected. States justified their actions on the fact that the Federal Government was neglecting eastern tribes and upon a dubious legal theory known as the "Thirteen Original States doctrine," which held that these States had special rights and relations with tribes. By the middle of the 19th century most of the land transactions now at issue had occurred, and without the required Federal supervision. In fact, by mid-19th century the Federal Government was acting as if there were no Indian tribes in the eastern United States.

When the claims activity began in seriousness in the 1970s, it was discovered that a 1966 statute of limitations concerning Indian trespass claims was about to run out. This provoked a flurry of filings. Congress has acted several times since to extend the deadline in order to deter lengthy and extensive litigation and to facilitate negotiations. Although most of the land claims have been filed under the Nonintercourse Act of 1790, each one is different and has an individual history.

The Maine land claim of the Passamaquoddy and Penobscot Tribes is the largest and perhaps best known of the claims. The Passamaquoddys discovered among some old papers a purported treaty of 1794 whereby they and the Penobscots had ceded vast quantities of what is now Maine. This "treaty" occurred without Federal supervision. The tribe first attempted to discuss the matter with Maine officials; it was not taken seriously. It then took the tribe nearly a decade to obtain legal representation. Once that was obtained, substantial research was undertaken on the complex issues surrounding it. The results were published as a law journal article in Maine, a tactic to educate the Bar of Maine, and the

tribes requested the United States to represent them in their claim against the State. The United States turned down the tribal request, claiming that the tribes were not federally recognized. The tribes sued. The Federal district court found that the Nonintercourse Act created an obligation for the United States and the United States could not deny this obligation solely on the ground that it had not acknowledged its trust relationship to the tribe. Subsequent litigation strengthened the tribal position on the substance of the claims by dismissing the defenses popularly thought to be available. After a portracted negotiation process, the Maine claim was settled and enacted into legislation in late 1980.

Another major land claim involves the Oneidas in New York State. This claim is based both on the Nonintercourse Act and specific treaties of the tribe with the United States. There is evidence in the case that New York State knew all along that its land dealings with the tribe were in direct violation of Federal law but persisted nonetheless. A portion of the case was litigated to determine whether New York or Federal law would determine the outcome. The answer was clear—Federal law controlled Indian land transactions wherever they occurred. The local district court has indicated its preference for a political solution as opposed to litigation involving approximately 315,000 acres claimed by the Oneidas, the Cayugas, and the Mohawks.

A case that has attracted national prominence is *Mashpee,* and it is the only claim to have gone to a jury trial. The Mashpees lost their case at the trial level when a Boston jury determined that the Mashpees were not a tribe during the transactions in question. Mashpee is both an Indian community and an incorporated township on Cape Cod, Massachusetts. The township had been Indian controlled for over a century until the Cape experienced a real estate boom in the 1960s and non-Indians moved into the area in vast numbers. The Indians lost political control of the town, the common land areas, access to fishing, and other traditional activities. A newly incorporated tribal entity formed, bringing suit to recapture lands lost in the 19th century. The trial was expensive and time consuming, and the entire situation racially polarized the community.

Other claims involve the Schaghiticoke Tribe and Western Pequots in Connecticut, the Catawbas in South Carolina, and the Narragansetts in Rhode Island. The Narragansett claim is the only one that has been quickly settled. After the initial litigation reached some preliminary conclusions as to defenses and the establishment of a *prima facie* case in 1976, negotiations between cooperative State, tribal, and Federal officials commenced. A settlement was reached in March 1978. Congress appropriated funds to carry out the 1,800-acre settlement and President Carter promptly signed the measure.

Not all the land claims have proceeded as amicably or speedily as the Narragansetts'. Negotiation, however, has become the key process for eastern land claims. The negotiation process has had a somewhat uncertain history because the Federal Government did not have a settled policy to deal with the claims, and the States resisted efforts at negotiations. Tribes generally have been in favor of negotiation through the period of the claims conflict.

Chapter 5 concerns law enforcement issues on Indian reservations. The power of Indian tribes to deal with serious crimes committed on reservations has been limited by the U.S. Supreme Court and the U.S. Congress. Consequently, the Federal Government now bears the primary responsibility for law enforcement on Indian reservations. It is a responsibility, however, that is not being fully met.

While procedures for investigating serious felony offenses vary on different reservations, a general pattern exists. Tribal police departments usually share the day-to-day responsibility for reservation law enforcement with BIA police and with BIA special officers, who are trained criminal investigators. When a crime is committed, a tribal officer or BIA patrol officer is ordinarily first on the scene. After determining that an offense is serious, the officer calls in a BIA special officer who conducts the initial investigation and then notifies the FBI. The FBI generally conducts an independent investigation and presents the case to the U.S. attorney for prosecution.

Primary responsibility for criminal prosecutions rests with individual U.S. attorneys whose exercise of discretion is not limited or monitored to any great degree within the Department of Justice. Because of the penalty restrictions on tribal courts, no serious action ordinarily will be taken against an offender if the U.S. attorney fails to do so.

Federal law enforcement in Indian country has generated criticism from many quarters. Studies by the American Indian Court Judges Association, the Department of Justice Task Force on Indian Mat-

ters, and the American Indian Policy Review Commission have identified a number of problems.

A nationwide study by the American Indian Court Judges Association in 1974 found confusion and lack of coordination among the Federal agencies involved and deep dissatisfaction within the Indian communities receiving Federal law enforcement services.

Following the Wounded Knee incident on the Pine Ridge Reservation in South Dakota, the Department of Justice convened an intra-agency task force to examine the execution of its responsibilities toward Indians. In October 1975 the Task Force issued its report, which found that the issue of reservation law enforcement has long been neglected. The report termed the problem "of major proportion crossing many bureaucratic and jurisdictional boundaries" and found it "particularly embarrassing that the present problem exists in an area of primarily Federal responsibility."

The American Indian Policy Review Commission, established by Congress to evaluate Federal policies and programs in relation to Indians, was also highly critical of Federal investigation and prosecution of offenses in Indian country in its 1976 report. This report corroborates, for the most part, the findings and recommendations made 4 years earlier by the Department of Justice Task Force. The problems fall into three categories:

(1) **Statistics:** The statistics kept by the Federal Government regarding law enforcement on Indian reservations do not permit accurate analysis or systematic monitoring of the quality of law enforcement.

(2) **Investigation:** The FBI's investigatory role results chiefly in delay and duplication of work done by BIA and tribal investigators, and the FBI's effectiveness is hampered by the widespread perception of Indians that the FBI is working to suppress militant political activity.

(3) **Prosecution:** U.S. attorneys are slow to respond when crimes under their jurisdiction have been committed on reservations, and such a high percentage of cases are declined for prosecution that crimes in Indian country go virtually unpunished.

The Department of Justice Task Force concluded that the FBI's investigatory role in reservation law enforcement was at best duplicative and, in fact, often impeded effective and speedy law enforcement by lengthening the time between the crime and the prosecution. The Task Force found that less serious felonies were not treated as a priority by the FBI, which was slower to respond in such cases, and the report also noted that there was often a difference in the FBI's response to a reservation crime when the victim was a non-Indian.

Although the Task Force recognized BIA inadequacies in providing police services to reservations, it found the BIA's criminal investigative capacity was not inferior to that of the other agencies the Justice Department regularly dealt with. As a result, the Task Force recommended that the FBI assume a supportive rather than a primary role in the investigation of major crimes on reservations and that U.S. attorneys accept referrals for prosecution directly from BIA criminal investigators. This recommendation was never implemented, and the Task Force ceased to exist with the change in administrations in 1976. The problems, however, remain.

The availability and allocation of FBI resources is one factor affecting its performance on Indian reservations. At the national level, the Department of Justice sets priorities for the allocation of investigative and prosecutorial resources based on which kinds of criminal activity have the greatest impact on society. At present, investigations of organized crime, white-collar crime, and national security violations are top priority, and investigations of crimes on Indian reservations are the lowest priority. As a result, there are inadequate FBI resources at the local level with which to serve the reservations. When the national priorities for investigation of Federal offenses were being established, the United States attorney for Arizona wrote the Director of the FBI requesting that investigation of crimes on Indian reservations receive top priority in those Federal districts that contain reservations, since there was no effective alternative to Federal prosecution of major crimes. The FBI Director denied the request and later explained that it was not granted because it was "inconsistent with our effort to identify those types of offense which have the greatest impact on our society." At the same time, the total amount of FBI resources on a national level is being decreased for budgetary reasons, and this cannot help but cause a reduction in the availability of FBI investigative services on Indian reservations.

The FBI's performance is affected also by its credibility in the Indian community. A number of complaints have arisen, particularly from the South Dakota reservations, about the conduct of FBI agents. Many Indians believe that the mission of the

FBI is to supress dissent and radical political activity by Indians, rather than to act as an impartial investigative agency, and that the FBI's response to a crime depends on the identity of the victim.

The lack of accurate statistics makes it difficult to assess the contention of disparate treatment by the FBI. Moreover, because complainants are not notified of the disposition of the complaints, the FBI does nothing to dispel any false impressions within the Indian community about FBI misconduct or to assure the community that appropriate action has been taken when misconduct is found.

There is no question that Federal prosecution of cases arising in Indian country presents unique difficulties, including logistical problems such as transporting defendants and witnesses great distances, language and cultural problems leading to uncooperative or unresponsive witnesses, and problems stemming from the large percentage of alcohol-related offenses. The Department of Justice Task Force found that all these factors affected the exercise of prosecutorial discretion by U.S. attorneys, who understandably found it difficult, given the competing demands on their resources, to justify great expenditures of time on cases they were unlikely to win. As Indian spokespersons have pointed out, however, it was the Federal Government, not the Indian tribes, that took the initiative to assume Federal jurisdiction over serious felony offenses in Indian country and to deprive tribes of the authority to exact meaningful sanctions. The Federal Government, therefore, should bear the burden of providing sufficient resources for an adequate prosecutorial effort.

In addition to encouraging antisocial behavior, the failure to prosecute a crime engenders communal anger and a breakdown of the social structure. Beyond that, whatever trust the Indian community has in the good faith of the Federal Government is shattered.

Although law enforcement on Indian reservations is fraught with problems, they are not insurmountable. Where participants in the system are flexible, improvements are possible. Innovative programs in Arizona and on the Pine Ridge Reservation in South Dakota, for example, have demonstrated that there is a more positive role for Federal law enforcement in Indian country.

For years, several organizations and agencies have advocated a nationally coordinated approach to improving the Federal role in law enforcement on Indian reservations and increasing tribal responsibility for this activity. The problem is not conceptual; it is the willingness of the Federal Government to undertake the commitment necessary to ensure both quality law enforcement and tribal self-determination. Continuing an essentially passive or reactive role tends to exacerbate problems rather than solve them.

A recent example of this lack of a coherent and coordinated Federal law enforcement policy is the hiatus created by the decision of the Supreme Court of the United States in *Oliphant v. Suquamish Indian Tribe* that Indian tribes lacked jurisdiction to try and punish non-Indians for criminal offenses committed on reservations. Although the initial emotional reaction to the *Oliphant* decision has died down, problems remain on many reservations. Some questions raised by the decision are whether tribal police may lawfully arrest and detain non-Indian offenders on the reservation and hold them for submission to local authorities, how to determine whether an accused offender is an Indian or a non-Indian, and whether and under what circumstances the State or the Federal Goverment has jurisdiction over an offense.

As a result of the confusion and the inability of the Department of Justice to form and implement policy quickly and effectively, at the time of the investigation by the U.S. Commission on Civil Rights, practices of State, Federal, and tribal officials varied. For example, on the Pine Ridge Reservation in South Dakota the problems had been solved by a close working relationship between tribal and county law enforcement officials. Although no cross-deputization exists, an informal system of citizen's arrests was working smoothly. The parties involved have demonstrated that it is possible to handle non-Indian offenders if the matter is approached in good faith and with good will. On South Dakota's Rosebud Reservation, by contrast, no cooperative arrangement for handling non-Indian offenders has been worked out. The State's attorney for Tripp County declined to accept for prosecution complaints issued by tribal police to non-Indian traffic offenders, although such a system existed in the fifties. Consequently, according to a BIA official, lawlessness has been encouraged among some non-Indians.

Findings

General Findings

1. Federal policy concerning Indian tribes has vacillated between fostering Indian assimilation and supporting tribal autonomy. Current Federal policy supports Indian self-determination.

2. A lack of information about the history, law, and culture of the various Indian tribes distorts citizen and government perceptions of issues between Indians and non-Indians and affects Federal decisionmaking.

3. A legacy of racial stereotypes continues to influence Federal Indian policy and hampers implementation of the national policy of Indian self-determination.

4. The existing Federal system for protecting Indian rights has significant limitations:

- The trust relationship has been based on assumptions of Indian cultural inferiority.
- The United States has a conflict of interest in acting as an agent for the tribes while performing in its various other governmental capacities.
- Judicial recognition of the extraordinary congressional power concerning Indian affairs continues to limit the enforcement of Federal obligations to tribes.
- Even where courts uphold Indian claims (for example, with respect to treaty fishing rights), far greater commitment and cooperation than now exists between the executive and legislative branches is required for effective enforcement.
- Coherent executive branch mechanisms for determining and implementing policy are lacking.

Civil Rights Violations

1. Recent conflicts over Indian rights have exacerbated the continuing equal protection problems Indians face.

2. Non-Indians have erroneously attacked and characterized Indian rights as unlawful discrimination against non-Indians.

- Indians' civil rights have been violated throughout history.
- Civil rights violations are promoted by public ignorance of Indian rights and by the failure of appropriate parties to respond promptly to any infringement of Indian rights.
- Although Indians face civil rights problems similar to those of other minorities, the context in which these occur is unique.

State and Local Governments

1. Since they represent primarily non-Indian constituencies, State governments may be expected to continue promoting non-Indian interests in matters of conflict.

2. Some States have played a direct role in fostering conflict and resistance when Indians assert their rights.

3. States and tribes have varied greatly in their responses to situations of conflict and common problems. State actions run the gamut from actively pursuing cooperative agreements with tribes to using physical force against Indians.

4. Recently, some State and local governments have taken a collective approach to conflicts with various Indian tribes by working through established national organizations of government. Although this development is promising for the negotiation of many issues, it could also have the potential of increasing State power at the expense of tribal rights and tribal governments.

Fishing Rights

1. Indian tribes have been in conflict with the States over fishing rights throughout this century.

2. The Federal Government as guarantor of Indian fishing rights has not effectively protected and assured these rights.

3. Throughout this century, the State of Washington has utilized its governmental authority in such a manner as to deprive Indians of their fishing rights.

4. Indian tribes have been blamed erroneously for the crisis concerning the scarcity of fish.

5. The fishing rights conflict, which is a dispute over property rights, has racial dimensions.

6. The Federal Government has played the following contradictory roles in the fishing conflict:

- counsel for tribes in much of the litigation;
- mediator in the fishing crisis through the establishment of a Federal task force;
- regulator of the fishery; and
- financer of State fishery programs.

7. By establishing a task force designed to renegotiate treaty rights, the United States failed to act as trustee, operated with a substantial conflict of interest, and subjected the tribes to a political process in which the tribal position was weakened.

Land Claims

1. The failure of the Federal Government to implement effectively its statutory commitments to tribes resulted in the Indian land claims.

2. Both the United States and the individual States initially refused to take tribal claims seriously, thus missing opportunities for negotiations and ultimately escalating the conflicts.

3. The United States, after initial efforts that were unsure and unsuccessful, has adopted a case-by-case approach to negotiation as a means to solve land claims. Some of the principles established include the following:

- Good faith negotiations must have been attempted before a claim may be litigated.
- If necessary, the United States will litigate meritorious claims.
- Affected Federal agencies and the "injured" tribe determine what they will accept in lieu of court action using a task force approach.

4. Tensions arising from the land claims have exacerbated racial animosities in affected communities, especially where State and local officials have been unwilling either to take the claims seriously or to negotiate.

5. For the eastern tribes, land claims provide a potential for future economic and cultural survival.

Federal Law Enforcement

1. Through the historical development of treaties, statutes, and case law derogating tribal functions, the Federal Government has assumed primary responsibility for law enforcement in Indian country.

2. The United States attorneys of the various Federal districts containing Indian land have primary responsibility for the prosecution of serious criminal offenses occurring in Indian country.

3. Through custom and historical circumstances, the Federal Bureau of Investigation has assumed primary responsibility for the investigation of serious felony offenses occurring in Indian country that fall under the Major Crimes Act (18 U.S.C §1153).

4. Many facets of Federal law enforcement in Indian country have received widespread, repeated, and justified criticism from public and private organizations over the past decade.

5. The statistics kept by the Federal Government regarding law enforcement on Indian reservations do not permit accurate analysis or systematic monitoring of the quality of law enforcement.

6. The FBI's role in investigating criminal offenses in Indian country, for the most part, results in delays and duplication of the efforts of Bureau of Indian Affairs and tribal investigators.

7. The current level of FBI resources available for the investigation of criminal offenses in Indian country is insufficient.

8. The FBI provides no specialized training for its agents assigned to investigatory duties in Indian country.

9. Indian perceptions of FBI agents as "outsiders" hampers their investigative efforts in Indian country; FBI agents are perceived widely in the Indian communities as biased against "militant" Indians and Indian organizations.

10. Procedures for investigating allegations of agent misconduct are inadequate in the following ways:

- No regulated, publicly promulgated, complaint-intake procedure exists.
- Complainants are not notified of the disposition of their complaints.
- The monitoring of complaint procedures and compilation of data are inadequate.

11. Federal law enforcement in Indian country is extremely difficult because of the enormous geographical distances and the cultural separation between Indian communities and the nontribal prosecutorial and judicial systems.

12. The disproportionately high rate of Federal declination of prosecutions in Indian country adversely affects public safety in Indian communities.

13. The Federal Government is providing insufficient prosecutorial resources to meet the responsibilities it has assumed in Indian country.

14. There is no coordination or systematic monitoring within the Federal bureaucracy of Federal law enforcement responsibilities in Indian country.

15. The lack of a coordinated Federal approach results in individual rather than institutional decisionmaking, inefficient use of resources, and failure to take advantage of lessons learned by past experiences in the performance of Federal law enforcement functions.

16. The decision of the United States Supreme Court in *Oliphant v. Suquamish Tribe,* which held that Indian tribes lack jurisdiction to try and to punish non-Indian offenders, has caused substantial law enforcement problems on those reservations where significant numbers of non-Indians are present.

17. In some areas, tribes and local governments have been able to work out cooperative arrangements for the handling of non-Indian offenders.

18. The Federal Government has not taken sufficient action to ensure the safety of Indian reservations from non-Indian crime.

19. The Federal Government has not sufficiently asserted the legitimacy of the exercise of governmental powers by Indian tribes.

Recommendations

General Recommendations

1. To encourage the opportunity for self-determination, viability, and effective functioning of tribal governments, Congress should recognize Indian tribes on the same basis as it recognizes States and their subdivisions for purposes of general funding.

2. Congress should support the preservation and promulgation of Indian culture, arts, crafts, and values through the establishment of a national institute.

3. Congress should provide for an independent trust counsel authority to furnish legal representation to Indian tribes in cases where the Federal Government has a conflict of interest that precludes it from effectively representing tribal interests.

4. The performance of the Federal Government in implementing and protecting Indian rights would be improved by:

- Creation of a joint Congressional Oversight Committee on Indian Affairs.
- Submission of an Indian trust impact statement to such a joint congressional committee whenever action contemplated by the executive branch could significantly affect protected Indian rights, such as treaty rights, rights of self-government, and rights to natural resources.
- Enhanced coordination at the White House level of Indian policy throughout the executive branch.
- Provision for special staff within the office of the Attorney General to coordinate the various ongoing responsibilities for Indian affairs within the Justice Department.
- Special consideration of Indian issues in the annual review at the Office of Management and Budget level with particular attention to natural resources, law enforcement, and social services.
- Development of an effective monitoring system in the Department of the Interior to determine those issues that could affect Indian rights or that have significant potential for conflict.

5. Congress should either establish an independent governmental entity or contract with nongovernmental entities to provide mediation, conciliation, and arbitration services for settling disputes between tribes and the Federal, State, or local governments.

Civil Rights Violations

1. An Office of Indian Rights should be reestablished, with an adequate staff, within the Civil Rights Division in the Department of Justice.

2. Community Relations Service personnel of the Department of Justice should be more available to help communities resolve conflicts involving Indian tribes.

State and Local Governments

1. Congress should support efforts by tribal and non-Indian governmental leaders to negotiate conflicts and reach cooperative agreements. Any broad jurisdictional waiver of rights by tribes to effect such agreements should be accompanied by an administrative review process that protects tribal rights within the Department of the Interior.

Fishing Rights

1. Congress should provide for enhancement of the salmon resource, diminution of the inflated non-Indian fishery, the development of tribal fishery management capacity, and increased coordination between the various State, tribal, and Federal entities with jurisdictional responsibility.

2. In the absence of an effective Federal, tribal, and State management mechanism, a continued strong Federal presence, such as that currently provided by the Federal court, is required to implement and enforce treaty fishing rights.

Land Claims

1. The prelitigation task force approach, in which the United States and the tribes jointly determine an acceptable settlement prior to full litigation of the claim and before bringing Congress, the State, and local communities into the process, should be maintained for eastern land claims.

Law Enforcement

1. The Department of the Interior should conduct a review and provide its findings to the

Department of Justice on the status of law enforcement on all Indian reservations, identifying those areas of difficulty in the arrest and prosecution of non-Indian offenders.

2. In light of the *Oliphant* decision, the Department of Justice, through the Attorney General, should publicly state its commitment to the protection of public safety on Indian reservations from non-Indian offenders by whatever means are necessary and effective.

3. The Department of Justice should undertake the following steps to implement its commitment to public safety on Indian reservations, in consultation with affected tribal governments:

- Employ the good offices of Department officials, including the U.S. attorney and the Community Relations Service, to encourage the development of a cooperative working arrangement between tribal and local governments for the arrest and prosecution of non-Indians committing offenses on Indian reservations.
- In the event that arrangements cannot be developed for prosecution of non-Indian offenders in the State system, a directive should be issued by the Department of Justice through the *Manual for United States Attorneys* that non-Indian offenders be prosecuted in U.S. district court or magistrate's court.
- In those situations where there is reason to believe that State or local authorities are discriminatory in failing to prosecute non-Indian offenders committing offenses on Indian reservations, the Civil Rights Division of the Department of Justice should investigate and seek appropriate injunctive relief in the U.S. district court under Title II of the Indian Civil Rights Act.

4. The Department of the Interior, in consultation with the Department of Justice and tribal governments, should undertake a program to upgrade tribal police forces so that all State requirements for cross-deputization can be satisfied.

5. Congress should enact legislation permitting Indian tribes, at their option, to assume criminal jurisdiction over all persons within reservation boundaries, in compliance with the limitations and procedural guarantees specified by the Indian Civil Rights Act.

6. The FBI charter should be amended to provide the following types of checks on agent misconduct:

- Oversight responsibility of the House and Senate Judiciary Committees, assigned in the proposed charter for the FBI (S.1612, 96 Cong., 2nd sess.), should specifically provide both committees with full access to information about FBI internal investigations of allegations of misconduct.
- A civil right of action for recovery of damages for violation of the charter's mandate should be included.

7. The FBI should provide complainants who allege misconduct by FBI agents with information about the disposition of their complaints.

8. The Department of Justice, in consultation with the Department of the Interior, should establish a uniform system for the collection of statistics by reservation on criminal complaints and their disposition.

9. The FBI should be relieved of its primary role for investigating major crimes occurring in Indian country, and this responsibility should be assumed by the Bureau of Indian Affairs and tribal investigators, with the FBI providing back-up support as requested. The FBI should also be utilized on reservations similarly to the ways it is utilized in other governmental jurisdictions, such as in the investigation of generally applicable Federal statutes.

10. The FBI should be directed, and should be provided with adequate resources, to train BIA and tribal investigators in investigative techniques.

11. United States attorneys should be directed to accept referrals for prosecution directly from BIA and tribal investigators.

12. Federal officials assigned responsibilities in Indian country should be given specialized training in Indian law and culture.

13. Additional assistant United States attorneys and Federal judges should be assigned to Federal districts containing Indian country to assure adequate prosecutorial and judicial resources to meet the Federal responsibility.

14. The jurisdiction of tribal courts should be expanded to include offenses committed by Indian and non-Indian defendants with maximum sanctions of imprisonment for 1 year or a $1,000 fine.

15. The Department of Justice and the Department of the Interior should establish an interagency coordinating committee on Federal law enforcement effort in Indian country to monitor statistical patterns of criminal offenses on individual Indian

reservations; to determine what Federal law enforcement, prosecutorial, and/or judicial resources or training are necessary or desirable to improve the quality of criminal justice on particular reservations; and to examine local experiences with Federal law enforcement in Indian country to ascertain what innovative practices may be useful on a wider scale.

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